■

"But this constitution is a mere dead letter, and the best laws are useless, if they be not sacredly observed. It is therefore the duty of the nation to be ever on the watch that the laws be equally respected both by those who govern and by the people who are to be ruled by them. To attack the constitution of the State and to violate its laws is a capital crime against society; and if the persons who are guilty of it are those in authority, they add to this crime a perfidious abuse of the power confided to them. . . .

"The constitution and laws of a State are rarely attacked from the front, it is against secret and gradual attacks that a Nation must chiefly guard. Sudden revolutions strike the imaginations of men; their history is written and their secret sources are made known; but changes are overlooked when they come about insensibly by a series of steps which are scarcely noted."

Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the affairs of Nations and of Sovereigns,* translated by Fenwick in *"The Classics of International Law"*, Washington, 1916, Vol. 3, pp. 17-19.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

■

**Number**

UNITED STATES OF AMERICA ex rel.
William Henry Lohrberg, Sr.,
*Relator-Petitioner*
*v.*
CLAUDE O. NICHOLSON, WARDEN,
and FRANCIS BIDDLE, ATTORNEY GENERAL,
*Respondents*

■

**Number**

UNITED STATES OF AMERICA, ex rel.
Ralph Falbo, Sr.,
*Relator-Petitioner*
*v.*
M. L. KENNEDY, SUPERINTENDENT,
and FRANCIS BIDDLE, ATTORNEY GENERAL,
*Respondents*

■

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## *Petitioners'*

# BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

## PRELIMINARY

### STATEMENT

For a statement showing the opinions of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the actions, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, a reference is here made to each petition for writ of certiorari and such is incorporated herein as though copied at length herein.[1]

### CLARIFICATION BY "BILLINGS" OPINION

Each case presents to this court the vital and all-important question of whether upon a pretext and pretense of expediency and convenience the judiciary can apply a rule of non-interference with administrative action until its orders are complied with so as to deny and suspend the inalienable writ of habeas corpus. This great prerogative writ was enshrined by the people of the United States in the Constitution for the preservation and protection of their lives and liberty and for benefit of their posterity. These blessings of liberty cannot be thrown overboard to mollify the demands of those who are clamoring for a destruction of the institutions of democracy on the *home front* as a price for effective prosecution of the war, because the only basis professed for maintenance of the war is to preserve these heritages. The courts are under a solemn obligation and oath before Almighty God to the people of the United States not to surrender to the demands of governmental agencies the people's jewels, their treasures and ideals locked in the Constitution by the founding fathers.

The petitions for writs of habeas corpus in these cases as well as the defenses urged upon the trial of the indictments were rejected upon a false premise and fiction, which

[1] See the petition for writ of certiorari in the *Lohrberg* case pp. 1-10; and in the *Falbo* case at pp. 1-10.

was that the administrative process had not been completed. The process of selection was complete because petitioners had been accepted for service. Under the Act and Regulations as construed by this court in the opinions filed in the *Falbo* and *Billings* cases it is held that the administrative process had reached the limit when the registrant proved acceptable to the branch of the service he was to be inducted into. In both these cases it should be noticed that each registrant had been classified in Class IV-E, the conscientious objector classification. Under Selective Service Regulations effective at the time each registrant was prosecuted under the Act, he was found acceptable when he had completed the final-type physical examination, which preceded the order to report for induction. The process of selection of conscientious objectors under the Regulations then in force is very similar to the process of examination and acceptance of registrants into the armed forces now. The acceptance preceded the induction. Each prisoner here had been found physically and mentally fit for service pursuant to Section 3 (a) of the Act before the induction order issued. The Regulations provided that a person classified as a conscientious objector must be given a final-type physical examination to determine if he is acceptable for the performance of work of national importance. (Regs. 651.1-651.8) If he is found physically and mentally qualified he is immediately declared acceptable for such work and the local board notifies the National Director of Selective Service that the registrant is ready for assignment to do work of national importance. (Regs. 651.10-652.11)

It should be noticed that the process of selection in reference to conscientious objectors then was altogether different from that of selecting men for the armed forces.

In the case of men found acceptable for the performance of work of national importance the acceptance and assignment and the performance of the work are all carried on under the jurisdiction of the Selective Service System. Even

after a conscientious objector is inducted into the work camp he is still under the supervision of the Selective Service System.

In the case of a man classified as liable for training and service in the armed forces he is accepted and assigned to a post of duty by the armed forces and not the Selective Service System. Any reasons for completion of the process of selection as a condition precedent to judicial review in the case of men classified as liable for service in the armed forces do not control in the case of men classified for the performance of work of national importance under the direction of the Selective Service System. The Director of Selective Service has jurisdiction over the man classified as a conscientious objector from the time he is classified until the time he is discharged or released from a civilian public service camp.

The process of acceptance for the armed forces as described in the *Billings* case is entirely different from that provided for the acceptance of a person for duty of service in civilian public service camps. In the case of the conscientious objector he is declared acceptable by the local board at the time of the pre-induction final-type physical examination, whereas in the case of the registrant classified for duty in the armed forces he is not accepted until the completion of the physical examination conducted under the supervision of the military authorities at the induction station.

Since acceptance for duty has been declared by this court to be the termination of the process established by the administrative agency which entitles the registrant to a judicial review, it seems plain that both Lohrberg and Falbo had been declared acceptable and accepted for work in a civilian public service camp by their local boards after taking the final-type physical examination.

Reporting for duty at a civilian public service camp is the same as reporting for duty after acceptance at a military camp. There is no duty to take an oath or a cere-

mony similar to that conducted for a man inducted into the armed forces. The final liability for duty is fixed for the conscientious objector when he passed the final-type physical examination because he was thereupon declared acceptable for duty and service.

The reception at the camps is no part of the process of acceptance for duty as that had been previously determined and completed before the registrant had been ordered to report for induction. (Reg. 653.11) There is no possibility that the registrant might be released at the camp for physical defects because he has been previously examined and found acceptable. (Regs. 651.1-651.31) It is possible to be discharged at the camp only when the "assignee indicates that his physical condition has changed since his final-type physical examination" and it is only in case that he so indicates a change that "the camp physician shall examine him with reference thereto." (Reg. 653.11 (c)) Even upon rejection as physically unfit at the camp the registrant cannot be discharged upon the mere finding of physical unfitness, but he "will be retained in the camp or hospitalized where necessary". (Reg. 653.11 (c)) One who has reported for camp must "remain there until released or transferred elsewhere by proper authority". (Reg. 653.12) The language of the Regulations, the practice of the Selective Service System thereunder and the construction placed thereon by the administrative agency indicates that the status of the man changes from the time he reports at the local board for induction and transportation to the camp from that of a "selectee" to an "assignee". If he is a selectee and an assignee at the time he arrives at the camp it would be contrary to practice and reason to contend that the administrative process of selection had not been completed until he reported at the camp.

It seems plain that when this court considered the issues involved in the case of *Falbo* v. *United States*, 320 U. S. 549, the court made no distinction between the process of

selection of (1) a person classified as a conscientious objector and (2) a person classified to become a member of the armed forces. In the case of the one classified for duty in the armed forces the selection did not take place until the registrant (a) responded to the order to report or induction, (b) underwent a physical examination for the purpose of acceptance at the induction station, and (c) took the prescribed oath. In the case of *Falbo* he had been declared acceptable after his final-type physical examination and had been assigned to do work of national importance pursuant to such acceptance before he was ordered to report for induction. The order to report for induction was for the purpose of implementing the acceptance by the agency, that had been completed, and for making the selectee an inductee. The same process had been followed in the case of *Lohrberg*, who also had been accepted and assigned for work of national importance before his being ordered to report.

By force of the reason generated in the *Billings* case it is apparent that this court labored under a misapprehension of the selective process in the *Falbo* case. In the *Falbo* opinion it is said that the "order to report" is not "the equivalent of acceptance for service" and that the process of selection "does not end until the registrant is accepted by the army, navy, or civilian public service camp." Again the court says in the *Falbo* opinion that there was no provision for "judicial intervention before final acceptance of an individual for national service." Inasmuch as the final acceptance of *Falbo* and *Lohrberg* had taken place at their pre-induction physical examination long before the orders to report for induction had been issued to them it must be necessarily concluded that the right to a judicial intervention arose immediately from and at the time of the acceptance of *Falbo* and *Lohrberg* for training and service and they were not required to enter the trap of submitting to the jurisdiction of the camp authorities or to submit to induction at the respective local boards to do work of nation-

al importance and thus assume the status of inductees as a condition precedent to judicial review.

The last step in the selective process had been complied with when *Falbo* and *Lohrberg* were declared acceptable after the final-type physical examination. Since they had been accepted for duty prior to induction the act of reporting for induction merely completed the formal induction process and not the selection process which had been previously completed upon the acceptance of each of these IV-E men. The refusal of *Falbo* and *Lohrberg* to submit to being inducted to do work of national importance at a CPS camp by their declining to comply with the orders to report for induction is on a par with refusal of *Billings* to be inducted by declining to take the oath at the induction station where he had reported for acceptance by taking the final-type physical examination.

In the *Billings* case the court said that the *Falbo* case could not be used as a trap to force one to submit to induction in violation of his rights. The Bone amendment also draws the same line in reference to the induction of conscientious objectors as it does in regard to the induction of men for the armed forces. If the *Falbo* case cannot be used as a trap to compel one to be forced by physical violence or duress to submit to induction into the armed forces, then by parity of reason the language of the *Billings* case compels the conclusion that after one has been declared accepted by the Selective Service System for the performance of work of national importance he cannot be forced to submit to induction as a condition precedent to judicial review. If it is acceptance that completes the process of the administrative agency in regard to those chosen for the armed forces (*Billings* v. *Truesdell*) it is also acceptance which terminates the administrative process in the case of conscientious objectors. (*Falbo* v. *United States*)

The argument here made as to the termination of the administrative process upon acceptance for duty of service

in the CPS camps is supported by the construction placed upon the regulations by the Selective Service System in the amendment of the regulations on January 1, 1944 relative to preinduction physical examination in Part 629 of the Regulations. Part 651 (Regs. 651.1-651.10) has been repealed and so have sections of Part 652. The preinduction examination given to men classified for duty of service in the armed forces 21 days before the actual induction is also given conscientious objectors. After the examination is completed selection and assignment are made by the Local Board and the Director of Selective Service, while the man classified for service in the armed forces is accepted by agents of the armed forces.

Since one cannot be compelled to submit to induction as a condition precedent to judicial review after he has been accepted for training (*Billings* v. *Truesdell*) it necessarily follows that he is not required to take the last step ordered by the local board when it is only to submit to induction. The purpose of reporting is not to determine if the person is acceptable. He is already a selectee. He has been found acceptable. The sole purpose of reporting is to submit to induction. Certainly it is not the intention of Congress to require the registrant to perform a vain or hypocritical act of appearing at the induction station and there refusing to submit to induction as a condition precedent for judicial review. The law does not require the doing of an idle gesture before qualifying for judicial review.

In administrative law the exhaustion of administrative remedies prescribed or available under the Act and Regulations contemplate the taking of such steps which afford the person aggrieved by the order an opportunity to alter or reverse the order or escape the force thereof. It must be conceded that the compliance with any of the orders of the draft boards after final classification does not provide for an opportunity for a reversal or alteration of the order. It is only the compliance with the order to report for a

medical examination which gives the registrant further opportunity of being excused from liability for training and service.

*Falbo* and *Lohrberg* had both complied with the orders for a physical examination and both had been declared acceptable and fit for training and service and were accepted for service under the Act and Regulations. The orders to report for induction, following the acceptance, required them to submit to induction. Had they submitted thereto they would have submitted to a trap. Had they gone to the induction station and refused transportation to a camp they would have been doing an idle thing and may have encountered difficulties. Had they gone to the respective CPS camps and submitted to reception and induction there they would have been required to "remain therein until released" and could not have voluntarily left. (Regs. 653.11, 653.12)

After the process of selection has been completed and the assignment for duty has been made and final induction has been ordered the right to judicial review is thereupon available in defense of the person who refuses to submit to induction by failure to appear for induction and the right to make the defense to the indictment and the right to a judicial inquiry thereof upon a petition for writ of habeas corpus cannot be denied, refused, withheld or suspended because of his refusal to submit to induction or his contempt of the administrative agency. To require the selectee or assignee to comply with an induction order and appear at the induction station and there incur further penalties and run other risks by his wilful failure to submit to induction is to impose an unreasonable and arbitrary condition upon the right to contest the order and show that it is illegal.

Especially is this true in the case of one classified as a conscientious objector because there is *no requirement* for for taking an oath as the dividing line between civilian status and the status of an inductee.

To require *Falbo* and *Lohrberg* to go that far before allowing them the right to obtain judicial review is the same as requiring them to stand on their heads, go jump in the lake, or perform some other act entirely irrelevant and immaterial to the process of selection which had been made by the Selective Service System. Nor can it be argued that the process of selection is not complete until each is received in the camp where he may be rejected upon an examination by the camp physician. Section 653.11 (c) does not provide for a routine physical examination of each inducted person after reception at the camp for purpose of acceptance. The examination is available only to the person who "indicates that his physical condition has changed since his final-type physical examination for registrants in Class IV-E." (Reg. s. 653.11 (c)) It must be observed that the above quoted part of the regulation is now repealed.

The lurking possibility that there may be a change in the physical condition of the selectee or assignee such as would entitle him to a discharge upon or after induction does not warrant denial of judicial review nor require the individual to submit to induction. Every inductee possesses the possibility of discharge because of change of physical condition arising from injury, accident, plague, diseases of all kinds, or from lightning striking the camp. The prevalence of these possibilities does not require the registrant to appear at the camp and await the arrival of a change of physical condition as grounds for judicial review. The contingency may never arise and is too vague and indefinite as predicate for judicial review. Where the registrant has been found physically qualified for service and accepted and assigned for service pursuant to the Regulations judicial review cannot be denied for failure to appear for and submit to induction.

The act of submitting to induction is not an administrative remedy contemplated by the Act but is satisfaction of the administrative order or process. It is a hollow formalism

which neither adds to nor detracts from the merits of petitioners' claim. The law does not require performance of a vain and needless thing before judicial powers can be invoked. *Utley* v. *St. Petersburg,* 292 U. S. 106.

Since petitioners were wrongfully and illegally ordered to report for national service in a CPS camp, then justice forbids that their refusal to submit to induction after acceptance should be made the basis for their imprisonment as felons. That must be admitted. But the question is, how and when this defense may properly be raised. Logically, this defense should have been premitted when petitioners were tried on the criminal charges, even as both seasonably asserted at their respective trials. But the rule adopted and misapplied by the courts, and ultimately confirmed by this Court in *Falbo* v. *United States,* 320 U. S. 549, prevented petitioners from urging this defense. It is for this reason that petitioners have been forced, as a last resort, to fall back on the ancient and extraordinary remedy of *habeas corpus* to assert their admitted defense. Petitioner Falbo presents to the court consecutively with his petition for certiorari in this case, a motion for leave to file out of time a second petition for rehearing and recall of mandate, to enable this Court to reconsider its original judgment entered on January 3, 1944, in *Falbo* v. *United States,* supra, together with his second petition for rehearing. Because of the close relation of the problems therein discussed to the issues in this petition, reference is here made to the reasons and argument contained in said second petition for rehearing, and same are incorporated herein as though copied at length at this point, and the court is requested to consider the tendered petition for rehearing as part of this brief.

If the judgment of the courts below be sustained and the right to the writ of habeas corpus be denied for the reasons stated by the courts below, then the hands of time have been violently turned back to that era of darkness in which the forefathers lived in England from the reign of Henry VII to Charles I. During that time two tribunals, the Court of Star Chamber and the Court of High Commission, both administrative agencies, were manufactured by the king. These two agencies, as abundantly shown by history, exercised a most fearful authority over the people. Against their excesses and abuses the most upright and conscientious judge could not afford relief, because of technical rules invoked by the crown which had the effect of suspending the writ of habeas corpus. This condition of suppression of the people's liberty raised an uproar, which ended in revolution, the trial and decapitation of Charles I, and the establishment of the Commonwealth under Cromwell, who restored many of the liberties of the people, including the writ of habeas corpus. In 1861 *Mr. Lincoln* said: "If by the mere force of numbers a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution —certainly would if such a right were a vital one." (*Voices of Democracy,* Government Printing Office 1941, p. 11)

## ARGUMENT

### POINT ONE

**The history of the writ of habeas corpus, the express provision of the Constitution securing it to the people, the statutes which implement the constitutional guarantee and the absence of any language in the Act in question denying the writ expressly as a means of judicial review of the illegality of the draft board order, together with the construction placed on the Act by the United States Supreme Court in the *Falbo* case, dispel any intention or implication of Congress to withhold the remedy until compliance with the order and makes imperative the allowance of the writ to review the cause of the detention of Lohrberg and Falbo, and the refusal of the courts below to issue the writs of habeas corpus constitutes a suspension of the writ of habeas corpus contrary to Clause 2, Section 9, of Article I of the United States Constitution and the habeas corpus statutes enacted thereunder; therefore the court below erred in affirming the judgment and this court, in the exercise of its discretion, should grant the writs.**

#### A

HISTORY AND GENERAL SCOPE OF THE WRIT OF HABEAS CORPUS

The great and arbitrary powers assumed and granted to the sheriffs in England in ancient times were usurped by an abuse of ill-defined discretion. They were thereby empowered to arrest and hold persons on suspicion without commitment or by order of star chamber proceedings. The intolerable abuses of the criminal process of the law of the land led to the invention by the chancery of writs commanding the production of the body of the person detained. The writ was first called the *writ de homino replegiando,* and later became known as the writ of habeas corpus. The writ of habeas corpus was issued before the Magna Charta under

the name of *de odio et atia* and is specifically mentioned in Article 36 of the Magna Charta which provides that it shall "not be refused". During these periods it played an important part in enabling a person to avoid trials by ordeal and by battle in violation of the right to a judicial trial. During the reign of Charles I, the king and his judges completely lost their reasons and balance. This was due to the weakness of the king, who yielded to ill-advised ministers and who was badly served by subservient judges. The warden of the Fleet Prison had made returns to writs of habeas corpus, stating that the prisoners, in whose behalf they had been obtained, were confined by warrant of the privy council or committed by special command of the king. Though counsel for the prisoners insisted that the council was bound to assign a sufficient cause of commitment, just as any petty magistrate would be, the judges decided that the royal mandate was warrant enough for any arrest and detention.

This same view was taken by the higher judges in *Darnel's Case* in 1627. The House of Commons thereupon passed resolutions to the contrary, and after a conference with the House of Lords the measure known as the Petition of Right was passed in 1627. (3 Car. I, c. i) In section 5 of this Act are recited the above facts, and it was enacted "that no freeman in any such manner as is before mentioned be imprisoned or detained". Later, in 1641, by Act abolishing the Star Chamber, the right to the writ of habeas corpus was given to test the legality of commitments by command or warrant of the king or the privy council.

The reign of Charles II was marked by further progress of the use of the writ of habeas corpus. Lord Clarendon was impeached for causing many persons to be imprisoned against the law and to be conveyed in custody to places outside of England. During 1679, in consequence of Clarendon's arbitrary proceedings, a new bill was introduced which

passed both Houses and became the famous Habeas Corpus Act of 1679 (31 Car. II, c. 2).[2]

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom. In England after a long struggle it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, 'for the better securing of the liberty of the subject,' which, as Blackstone says, 'is frequently considered as another *Magna Charta.*' It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors. Naturally, therefore, when the confederated colonies became united states, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words: 'The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.'

"The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.

"This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in light of it that we must determine the true meaning of the Constitution and the law . . .

"These considerations forbid any construction given to

[2] This history of the writ is compiled from Holdsworth, *History of the English Law*, vol. 9, pp. 108-125; *Encyclopædia Britannica*, 1942, Vol. 11, p. 53; *The Encyclopedia Americana*, 1942, Vol. 13, pp. 602-604; Cooley, *Constitutional Limitations*, 8th ed., vol. 1, pp. 709-728; *Watson on the Constitution*, Vol. 1, pp. 721-733; *Kent's Commentaries*, 12th ed. (Holmes), Vol. 2, pp. 32-42.

doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are." (*Ex parte Yerger,* 8 Wall. 85, 95-96, 102-103; and compare *Bridges* v. *State of California,* 314 U. S. 252, 264-266)[3]

In 1789 the writ of habeas corpus was first spoken of by the legislature when Congress passed the Act of September 24 (1 S. L. 81) to implement the provisions of the Constitution. The power was extended again by the Act of March 2, 1833, and again by the Act of August 29, 1842. The Act of February 5, 1867, expanded the right to the writ to its present use. Section 14 of the Act of 1789, *inter alia* provides that the writ shall extend to cases where prisoners are in custody by authority of the federal government and "are committed for trial before some court of the same". The provisions of the original act and the various amendments are now incorporated in Chapter 14 of the United States Code, sections 451 to 466.

In *Ex parte Watkins,* 3 Pet. 193, the court described the writ as "a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause".

The views of Mr. Justice Holmes expressed in his dissent in *Frank* v. *Magnum,* 237 U. S. 309, now appear to have been adopted by the court. In that case, at page 345, he said: " . . . habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and, although every form may have been preserved, it opens the inquiry whether they have been more than an empty shell." This perspective was reflected by the opinion in *Mooney* v. *Holohan,* 294 U. S. 103, 113, where it is declared that the

[3] Mr. Justice Stone exhaustively reviews the history, law and constitutional provisions on the subject in *McNally* v. *Hill,* 293 U. S. 131, 135-139, to which reference is here made.

writ was the "historical remedial process when one is deprived of his liberty without due process of the law in violation of the Constitution of the United States". Later, in *Johnson* v. *Zerbst,* 304 U. S. 458, the court held that the writ was intended to be preserved, not destroyed; that it was not narrowed, but expanded, by the Constitution and Congress; that it went outside the record and looked behind the forms; that the procedure thereon had been liberalized. The court held it must be alert to examine for itself. The Chief Justice in *Bowen* v. *Johnston,* 306 U. S. 10, declared that it was a precious safeguard of liberty and was available to release the prisoner when there is no offense shown to have been committed. He said that upon the court falls "no higher duty than to maintain it unimpaired". (P. 26) Again, at page 27, he said: "But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

In *Walker* v. *Johnston,* 312 U. S. 275, the court declared: "As we have said in *Johnston* v. *Zerbst,* 304 U. S. 458, Congress has expanded the rights of a petitioner on habeas corpus." (P. 285) Sustaining the claim for the writ, in *Smith* v. *O'Grady,* 312 U. S. 329, Justice Black referred to the writ as the great "historic remedy", thus echoing the views of the court expressed in prior cases. Speaking in *Holliday* v. *Johnston,* 313 U. S. 342, Mr. Justice Roberts stated: "a petition for the writ of habeas corpus ought not be scrutinized with technical nicety"; and further, "we have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of habeas corpus in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done."

Similarly in *Waley* v. *Johnston,* 316 U. S. 101, the court extended the writ and broadened its scope so as to permit

a full inquiry into facts entirely *dehors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said: "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (Pp. 104-105)

The circumstances under which the writ of habeas corpus lies has been aptly summarized in *Graham* v. *Squier,* 132 F. 2d 681 (CCA 9th), where it was held to be available in all cases of illegal imprisonment for whatever cause and under whatever pretense. See also the dissenting opinion by Judge Haney in *Zimmerman* v. *Walker,* 132 F. 2d 442, at page 447. Compare *Cochran* v. *Kansas,* 316 U. S. 255, 256-258, and *Pyle* v. *Kansas,* 317 U. S. 213, 215-216. In the *Pyle* case the writ issued because the conviction was alleged to have been obtained on perjured testimony for the state and the illegal suppression of defendant's evidence.

In a decision rendered by the United States Third Circuit Court of Appeals (*In the Matter of Sam Catanzaro, Jr.,* 138 F. 2d 100) it was held that the petition for writ of habeas corpus would not lie in advance of trial of the indictment of one charged with failing to obey an order of the draft boards. That decision is contrary to the weight of authority and should be disregarded by this court. In a dissenting opinion Judge Biggs, joined in by Judge Maris, said: "It is clear that a registrant is deprived of his liberty when he is arrested because he fails to report for induction. The restraint is wrongful if the order of the draft board violated by the registrant was invalid, unless it be true that the Selective Training and Service Act provides that

the order must be obeyed in any event and under any circumstances. The Act, however, does not so provide." (138 F. 2d 100, 103)

The holding in *Falbo* v. *United States*, 320 U. S. 549, 64 S. Ct. 346, is confined exclusively to the denial of the defense of invalidity of the order to indictments prosecuted in criminal cases. It cannot be said that the Act or that opinion circumscribed the jurisdiction of the federal courts in habeas corpus actions. Indeed habeas corpus was recognized in the *Falbo* opinion as available to review a classification after induction; and, of course, there is nothing in the decision from which it can be inferred that the writ could be denied one who has been illegally incarcerated under Section 11 of the Act, either by commitment for trial or judgment of conviction. Although the scope of judicial review under the writ of habeas corpus is guaranteed by the Constitution and needs no legislative declaration, Congress has seen fit to implement the consitutional provisions with strong statutes favoring the writ. The writ cannot be suspended by the courts at any time, and the executive can do so only by express enactment of Congress, which authority is confined to cases "of rebellion or invasion" where "the public safety may require it". (*Watson on the Constitution*, Vol. 1, pp. 724-729) It cannot be suspended by express law of Congress or construction of statutes by the courts in order to facilitate the war effort or to speed the raising of an army. *Ex parte Milligan*, 4 Wall. 1-125; *Ex parte Quirin*, 317 U. S. 1.

Neither Congress nor the Constitution imposes any restrictions or conditions as to the time of the illegal restraint, nor do they inflict any penalties against the person unlawfully imprisoned by denying the writ because the person refused to obey the administrative agency or other authority that causes the restraint. The prisoner is entitled to judicial review by writ of habeas corpus at any time, when the question cannot be otherwise reviewed, when it is shown

that the detention is either "by color of the authority of the United States", or the person "is in custody for an act done or omitted in pursuance of a law of the United States", or "is in custody in violation of the constitution . . . of the United States". 28 U. S. Code, Sec. 453. It should be noticed that failure to report for induction under the Act and Regulations is "an act . . . omitted in pursuance of a law of the United States" within the express meaning of the code.

By Section 452 of 28 U. S. Code the federal courts are given "power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty". Section 461 of Title 28 confers broad jurisdiction upon the courts, after a hearing of the writ, by providing that the court must thereupon "dispose of the party as law and justice require". The broad and beneficent provisions support the conclusions of Judge Biggs in his above dissent and the opinion of Judge Yankwich in *Ex parte Stewart,* 47 F. Supp. 410, where, at page 414, on the precise problem presented here, it is said: "In other words, my view is that, if an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a Selective Service Board, *no matter at what state he is restrained,* he may, by writ of habeas corpus, question whether there was evidence to sustain the action of the board. He does not have to wait until he is inducted, and direct his writ to the Commanding Officer. Nor does he have to risk conviction, desertion or court-martial." See also the opinion of the district court in *Goodwin* v. *Rowe,* 49 F. Supp. 703, reaching the same conclusion.

## B

THE DIRECT AND EXPRESS PROVISIONS OF THE CONSTITUTION GUARANTEEING THE WRIT OF HABEAS CORPUS COMPELS A CONSTRUCTION TO PERMIT THE WRIT SO AS TO AVOID HARSH AND UNCONSTITUTIONAL RESULTS.

The strong constitutional provision securing the inalienable writ of habeas corpus necessarily precludes this court from giving to the statute a construction which denies the writ of habeas corpus contrary to the constitution. It is the duty of this court to construe the Selective Training and Service Act of 1940 which does not mention the writ of habeas corpus, together with the habeas corpus statutes (28 United States Code, Sections 451 to 464), in such a manner as to avoid unreasonable, penalizing or unconstitutional results. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 351-352, where it is said: " . . . the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled." *United States* v. *Kirby,* 7 Wall. 482, 486-487.[4] To require the petitioner to report for induction after he has been declared delinquent and arrested is to impose the performance of an impossible condition.

The court's conclusions in the *Falbo* case withholding judicial review of the illegal draft board order in defense to the indictment does not support the conclusion of the courts below. In that case the court simply construed the statute by imputing to Congress the intent of denying said defense. Apparently that court considered the general provisions of the *due process* clause of the Fifth Amendment were not strong enough to preclude the court from thus construing the criminal sanctions clause of the Act and impliedly held that this interpretation placed on the clause did not bring it into collision with the Constitution. What-

[4] *Ex parte Cohen,* 254 F. 711; *Delaware & Hudson Co.* v. *Albany & Susq. R. Co.,* 213 U. S. 435.

ever are the considerations and grounds that might have led to the conclusions reached in the *Falbo* decision these are not sufficient reasons for the denial of the writ of habeas corpus to petitioner. The specific and strong provision of the habeas corpus clause of the First Amendment definitely rejects any such straining of the construction powers of the court concerning Acts of Congress challenged before the court. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, note 4.[5]

Accordingly, since Congress enacted the Selective Training and Service Act of 1940 and failed to provide an express declaration nullifying the availability of the writ and denying judicial review of illegal action of the board to one who refused to report for induction, it cannot be said that Congress intended to penalize such person by withholding the benefits of the writ. Chapter 14 of Title 28 of the United States Code was not repealed by the passage of the draft act. It must be assumed that the Congress intended that persons proceeded against or convicted under the Act would be equally entitled to the writ of habeas corpus as are persons illegally proceeded against or convicted under any other law of the United States. This court must not impute to Congress the intention of repealing the habeas corpus statutes when it passed the draft act. Repeals by implications are not favored, and a repeal will not be implied unless there be an irreconcilable conflict between the words expressed in two statutes. *Petri* v. *Creelman Lumber Co.,* 199 U. S. 487; *Wood* v. *United States,* 16 Pet. 362; *State* v. *Stoll,* 17 Wall. 430.

It cannot be argued successfully that the writ should be denied as a penalty for failure to report for induction. To sustain such a contention would obviously for ever preclude the courts from inquiring into the illegality of the restraint of a prisoner because it is impossible for the

[5] See also *Busey* v. *Dist. of Columbia,* 138 F. 2d 592.

induction process to place him in military custody when he has been reported to the district attorney as a delinquent. Thereafter he is subject, according to the Act, only to the jurisdiction of the Department of Justice to be dealt with according to law. This argument leads to penalizing the petitioner by suspending the writ contrary to Clause 2 in Section 9 of Article I of the United States Constitution. The court early in its life held this provision to be a restraint upon judicial action. (*Ex parte Yerger,* 8 Wall. 85, 95-96)

To now construe the statutes so as to penalize the petitioner by withholding from him the writ of habeas corpus because he held the draft boards in contempt for their violation of the law is to arbitrarily and capriciously discriminate against those who claim their legal rights in favor of subservient persons who comply with the illegal orders of draft boards. This discrimination cannot be allowed and the court will not permit the denial of the habeas corpus provisions of the statutes and the constitution because such would be the imposition of penalties so as to convert the statutes into a dragnet. *United States* v. *Shackford,* 5 Mason 445; *Bank of Columbia* v. *Okely,* 4 Wheat. 235; *United States* v. *St. Paul M. & R. Co.,* 247 U. S. 310, 313. The construction given the statutes by the courts below reads into them something that is not there, and constitutes mind-reading of the members of Congress, contrary to doctrine established by the Supreme Court which forbids such improper feats. To thus read the mind of Congress is to substitute *construction* for legislation and amounts to judicial legislation. *United States* v. *Missouri Pac. R. Co.,* 278 U. S. 269; *United States* v. *Felt & Tarrant Mfg. Co.,* 283 U. S. 269. The specific terms of the habeas corpus statutes securing the writ prevail over the reading between the lines of the Selective Training and Service Act of 1940 done by the courts below so as to deny the conclusion reached. *Kepner* v. *United States,* 195 U. S. 100.

Mr. Chief Justice Marshall, in *Ex parte Bollman et al.*, 4 Cranch [8 U. S.] 75, of and concerning the strong requirements of the constitutional writ of habeas corpus and the act of Congress implementing the provisions, says at page 95 of the opinion, to wit: "It may be worthy of remark that this Act was passed by the first Congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in ca. s of rebellion or invasion, the public safety might require it.'

"Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*....

"If at any time the public safety should require the suspension of the powers vested by this Act in the Courts of the United States it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws." (P. 101)

It is the duty of this court to give to the statute a reasonable construction. It is a rule of long standing, established by the court, that all reasonable doubts concerning the meaning of a statute should operate in favor of the rights of the defendant. In *Harrison* v. *Vose*, 50 U. S. 372, at page 378, the court said: "In the construction of a penal statute it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. In *United States* v. *Shackford*, 5 Mason 445, Justice Story says: 'It would be highly inconvenient, not to say unjust, to make every doubtful phrase a dragnet

for penalties' (p. 450)." Also, in *United States* v. *Kirby*, 7 Wall. 482, at pages 486-487, the court observed: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."[6]

The court is not authorized to extend a statute beyond the plain meaning of its terms.[7] Here the courts below certainly read into the statute something that does not exist, thus perverting the manifest intent of Congress. It is certainly no justice to find that the lawmakers contemplated habeas corpus only after induction as the only remedy so as to justify denial of the writ to one convicted under the Act, when the Act itself is absolutely silent on the matter!

In absence of an explicit command in a statute the court is not authorized to deny to one prosecuted under the act the right to the great writ of habeas corpus. In *Dismuke* v. *United States*, 297 U. S. 167, at page 172, Mr. Justice Stone, for the court, said: "But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. *United States* v. *Laughlin*, 249 U. S. 440, 443."

The courts below have not given the statute a reasonable

[6] *Sorrells* v. *United States*, 287 U. S. 430, 446; *United States* v. *American Trucking Ass'n*, 310 U. S. 534; *Helvering* v. *Hammel*, 311 U. S. 504, 510; *Ozawa* v. *United States*, 260 U. S. 178, 194.

[7] *United States* v. *Morris*, 39 U. S. 464, 14 Pet. 464; *Pierce* v. *United States*, 314 U. S. 306, 311-312.

construction and have strained absence of explicit commands to a breaking point and distorted the language of Congress used in the Act so as to accomplish unreasonable results. It must be conceded that denial of writ of habeas corpus is oppressive. Often the court has observed that statutes broadly drawn can be used as tools of oppression and to avoid such results a strict construction should be placed thereon to avoid a tendency to infringe the rights of the people.[8]

A construction of the language of the Act should be adopted that permits the writ of habeas corpus. This conclusion is inescapable because to give it the construction placed on it by the respondents makes it unconstitutional. The court has said that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[9]

The construction placed on the Act by respondents raises not only grave questions but a "succession of constitutional doubts", as suggested in *Harriman* v. *Interstate Com. Comm'n,* 211 U. S. 407, 422. See, also, *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546.

The courts below violated the cardinal rule of judicial construction of statutes, by amending the statute or reading into it something not intended by Congress. The conclusion reached is subversive of the statement of the court in *Fasulo* v. *United States,* 272 U. S. 620, 629: "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

Again, in *United States* v. *Chase,* 135 U. S. 255, 261:

[8] *Bank of Columbia* v. *Okely,* 4 Wheat. 235; *United States* v. *St. Paul M. & R. Co.,* 247 U. S. 310, 313; *Helvering* v. *Hammel,* 311 U. S. 504, 510.

[9] *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408; see, also, *Crowell* v. *Benson,* 285 U. S. 22, 62; *Wright* v. *Vinton Branch of Mt. Trust Bank of Roanoke,* 300 U. S. 440; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *Missouri Pac. Ry.* v. *Boone,* 270 U. S. 466; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 30.

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

The argument of counsel for respondents not only is contrary to fundamental concept of due process of law, but is also contrary to the spirit of the court's words expressed in *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 195, to wit: "Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under the Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law, for acts, whether done by governments or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of essential rights of property."

Disregarding skillful arguments made against judicial review, the court in *Federal Radio Comm'n* v. *Nelson Bros. Bond & M. Co.*, 289 U. S. 266, 278, said: "If the questions of law thus presented were brought before the court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that fact is not altered by the mere fact that remedy is afforded by appeal. . . . We must not 'be misled by a name, but look to the substance and intent of the proceeding'. *United States* v. *Ritchie*, 17 Howard

525, 534; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 479."

The court has held that the action of the administrative agency can be reviewed under the general judicial powers of the federal courts if a justiciable controversy is made out in the district court even though there is no provision in the statute for review of the order. Such reviews are commonly permitted by the court despite the provisions of the Urgent Deficiencies Act, the National Labor Relations Act, the Bituminous Coal Act of 1937, and other such agencies, declaring decisions to be final.[10]

## C

SINCE WRIT LIES TO TEST LEGALITY OF COURT-MARTIAL JUDGMENT AFTER CONVICTION ON SAME THEORY IT LIES HERE TO TEST VALIDITY OF ADMINISTRATIVE PROCEEDINGS UPON WHICH THE JUDGMENT OF CONVICTION RESTS.

It has never been questioned that a federal court can by habeas corpus inquire into the validity of a judgment rendered by a court-martial and if the federal court finds that the person restrained is not lawfully in the armed forces discharge him from custody under the commitment issued by the court-martial. In *Crowell* v. *Benson*, 285 U. S. 22, 58, Chief Justice Hughes said: "Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determination of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined *de novo* upon habeas corpus."

[10] See *Shannahan* v. *United States*, 303 U. S. 596; *United States* v. *Griffin*, 303 U. S. 226; *American Fed. of Labor* v. *N. L. R. B.*, 308 U. S. 401; *Utah Fuel Co.* v. *Nat'l Bituminous Coal Comm'n*, 306 U. S. 56; *Castleton Corp.* v. *Sinclair*, 264 U. S. 543; *Crowell* v. *Benson*, 285 U. S. 22; *David L. Moss Co.* v. *United States*, 103 F. 2d 395; *Fed. Trade Comm.* v. *Gratz*, 253 U. S. 421, 427; *Fed. Trade Comm.* v. *Curtis Co.*, 260 U. S. 568; *International Shoe Co.* v. *Fed. Trade Comm.*, 280 U. S. 291, 299.

Thus in *Ex parte Reed,* 100 U. S. 13; *In re Grimley,* 137 U. S. 147; *In re Morrissey,* 137 U. S. 157; *Johnson* v. *Sayre,* 158 U. S. 109; *Givings* v. *Zerbst,* 255 U. S. 11, 20, it has been uniformly held that the courts can inquire into the status of a person claimed to be subject to the jurisdiction of the armed forces. See also *Ex parte Cain,* 39 Ala. 440, where the alleged military status of a minister of religion was determined.

In *Ver Mehren* v. *Sirmeyer,* 36 F. 2d 876 (CCA 8), it was held that the petitioner was entitled to a discharge under court-martial proceedings where it appeared that he had not been legally inducted and that the Selective Service Regulations under the Selective Service Act of 1917 had not been followed. See also *Ex parte Milligan,* 4 Wall. 1-125. In the *Ver Mehren* case, supra, "The court thus went behind the court-martial back to the Board, and having found that the Board had improperly inducted him, wiped out the court-martial conviction entirely. In other words, after the petitioner had actually been convicted by court-martial, the court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance." (*Ex parte Stewart,* 47 F. Supp. 410)

Under the Selective Service Act of 1917 the selectee was automatically in the armed forces and subject to military jurisdiction after a certain date, even though he refused to report. He was treated as a deserter. Habeas corpus was the only remedy to obtain review of the action of the draft boards. The courts have not questioned the propriety of the writ to review action of the draft boards under the 1940 Act. (*Billings* v. *Truesdell*) The decisions

of many courts under both acts are set forth in a footnote.[11]

It is submitted that the trials in the United States District Court under the Selective Training and Service Act are the mere execution of the arbitrary edict of the draft boards. The prosecutions are a part of the machinery devised to raise an army and are contrary to the spirit of judicial proceedings as envisioned by the founders of the judiciary. Even though it may be argued that habeas corpus to review the proceedings in the district court is not available (and we do not agree with that argument, yet it will be here admitted only for the purpose of argument) the writ of habeas corpus is, nevertheless, available to review the legality of the administrative proceedings upon which the criminal prosecutions are based. If the writ is available to review the administrative action and conviction by court-martial after induction it is also available to review the administrative action after a conviction in the district court based on such action. This is especially true where Congress has devised a scheme whereby the inquiry cannot be made in the criminal prosecution as to the illegality of the administrative action. There must be judicial review at some time by habeas corpus to protect the rights of the individual. If it is not made available the people are left at the mercy of the draft boards for granting their liberty and the courts will have been made

[11] *Benesch* v. *United States*, 132 F. 2d 430; *Arbitman* v. *Woodside*, 258 F. 441; *Ex parte Hutflis*, 245 F. 798; *Ex parte Stewart*, 47 F. Supp. 410; *United States* v. *Rauch*, 253 F. 814; *Franke* v. *Murray*, 248 F. 865; *United States* v. *Heyburn*, 245 F. 360; *Angelus* v. *Sullivan*, 246 F. 54; *Ex parte Beales*, 252 F. 177; *United States* v. *Commanding Officer*, 252 F. 314; *United States* v. *Kinkhead*, 248 F. 141, affirmed 250 F. 692; *Ex parte Platt*, 253 F. 413; *Ex parte McDonald*, 253 F. 99; *Ex parte Cohen*, 254 F. 711; *Ex parte Thieret*, 268 F. 472; *United States ex rel. Filomio* v. *Powell*, 38 F. Supp. 183; *Application of Greenberg*, 39 F. Supp. 13; *United States ex rel. Broker* v. *Baird*, 39 F. Supp. 392; *United States ex rel. Ursitti* v. *Baird*, 39 F. Supp. 872; *United States ex rel. Errichetti* v. *Baird*, 39 F. Supp. 388; *United States ex rel. Pasciuto* v. *Baird*, 39 F. Supp. 411; *Micheli* v. *Paullin*, 45 F. Supp. 687; *United States* v. *Embrey*, 46 F. Supp. 916; *In re Rogers*, 47 F. Supp. 265; *Ex parte Robert*, 49 F. Supp. 131; *United States* v. *Smith*, 48 F. Supp. 842.

impotent and to stand as empty shells and monuments of a more liberal and enlightened age.

Judge Yankwich, in *Ex parte Stewart,* 47 F. Supp. 410, emphasizes the need of the writ of habeas corpus in this situation by saying: "The need for a competent authority to question the possible arbitrariness of a board is clearer, because of the fact that no questioning of the action of the Board is allowed in a prosecution resulting from disobedience of any of the orders issued by the Board. Were it otherwise, we should have an instance,—which our law abhors,—of finality of administrative action which might leave a person at the mercy or caprice of a lay board, without the power to review arbitrariness, abuses of authority or even lack of jurisdiction. Such a situation is inconsistent with the doctrine of limited sovereignty, which is at the basis of our constitutional structure, and which postulates the existence in the individual of certain rights which he can assert against the sovereign power itself. And, perhaps the most fundamental of these rights is the right of freedom of person, of which the individual cannot be deprived, even in wartime, except through machinery which guarantees the fundamentals of due process. (See Yankwich, *The Constitution and the Future,* Ch. III) . . .

"Suppose he stands convicted. Would he be in a better position to raise the question whether he was legally inducted by suing out a writ against the warden of the penitentiary? Most certainly not. Then, why should he wait? The only real question here is: Is the petitioner being deprived of his liberty by virtue of the action of the board? The answer is, Yes, because he has been arrested for failure to obey the order of the board. And he does not have to wait until he has been convicted to challenge that order. One may raise the question of due process after conviction. But a person need not wait until then."

## D

TO REQUIRE A REGISTRANT EXEMPT FROM DUTY TO REPORT FOR INDUCTION BEFORE PERMITTING HIM TO OBTAIN THE WRIT OF HABEAS CORPUS SUBJECTS HIM TO IRREPARABLE INJURY AND IS CONSTITUTIONALLY INADEQUATE.

No extensive argument is needed to show that induction for any service under the Act imposes heavy duties upon any inductee, forthwith stripping him of his civilian status and of his constitutional rights and freedoms enjoyed under civil law. Immediately on reporting for induction he becomes an inductee subject to regulations of the camps, without further action. The registrant on induction takes on a new status in much the same way that his obligations change, as when he marries. When inducted his status is so fixed and certain that it cannot be terminated at will but only according to law. He is a servant; the nation is his master. He must live a life of regimentation and is under very severe discipline. His rights as a private individual are gone. His life is imperiled by dangers of various kinds. He can make no personal choices as to life, liberty or pursuit of happiness, as civilians do. In civilian public service camp the inductee, as a national servant, mut obey rules of conduct and regimentation very similar to those obeyed by persons subject to military authority. Infraction of the rules is punishable. Forcing one to assume such a change of status constitutes a *penalty* inflicted upon the individual when compared with his status as a civilian. Justice Brewer, dissenting, pointed out that exclusion or deportation of a citizen on the charge that he is an alien is admittedly a *penalty* because it changes his status. *United States* v. *Sing Tuck,* 194 U. S. 161, 179-180. Compulsion of one to undergo a change in status by appearing for induction constitutes a hardship, loss and disadvantage to the civilian; hence it is a penalty. To a registrant *exempt from duty* under the Act it is admittedly a severe penalty to require him to report for induction as a condi-

tion to obtaining judicial review. If he claims exemption upon submission to and after induction he is certain to incur severe punishment at the hands of the military authorities, which is far more severe than the punishment provided by the Act for disobedience of an order to report for induction. Once he reports for induction he cannot successfully claim that the denial of civil rights or of rights in the civil courts is a denial of due process of law. The court has held that to those in the national service the military laws and regulations, rigorous though they may be, are due process. *United States ex rel. French* v. *Weeks*, 259 U. S. 326; *United States ex rel. Creary* v. *Weeks*, 259 U. S. 336.[12]

Habeas corpus is not an adequate remedy to protect the registrant claiming exemption under the Act. Existence of the remedy and the right to prosecute the action do not suspend military rules and practices nor the inductee's liability thereunder pending a review in the courts. As hereinafter shown,[13] those who, like Jehovah's witnesses, claim their exemption and decline to perform the obligations of a soldier, necessarily incur liability for severe penalties and suffer stern punishment. The court's opinion in *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, and cases there cited, compel the conclusion that habeas corpus, beset as it is with these deterrents, is not an adequate remedy to protect the registrant's civil rights pending final determination of the questions raised. Habeas corpus procedure is a civil action which must be brought at the expense of the petitioner and may prove illusory. The writ must be heard in the jurisdiction where the inductee is held and not where his local board

[12] Violation of his new military obligations may subject the inductee to a sentence of death under Article 64 of the Articles of War. (Sec. 1, ch. II, Act of June 4, 1920, 41 Stat. 787)

[13] Grave problems faced by civil and military authorities in the last war are calmly analyzed in "The Conscientious Objector" (21 Columbia U. Q'terly 253) (1919) by Harlan F. Stone; see, also, *Statement by the Third Assistant Secretary of War Concerning the Treatment of Conscientious Objectors in the Army* (1919), Government Printing Office; *The Conscientious Objector* (Boni and Liveright, New York, 1919), Walter Guest Kellogg, Major, Judge Advocate, U. S. A., chairman, Board of Inquiry.

is situated. He may be so far removed from witnesses, friends, family, lawyer and finances as to render impractical successful prosecution of a habeas corpus proceeding. Circumstances often are such as to make prohibitive the instituting of an action for a writ. Especially is this true if the inductee is transported to a foreign shore beyond reach of the judicial process of the United States courts. This might easily result in many, if not all, cases. While trying to marshal his assets, friends, kin and counsel to institute the proceeding he might easily be transferred to a camp in another jurisdiction or entirely removed from the country.

Irreparable injury to which he is thus subjected, if forced to submit to induction as a means of testing the validity of the order, must be conceded to be greater than any inconvenience or injuries the court has held in other cases to be grounds for allowing judicial review prior to compliance with administrative process. In the last war there were over 500 court-martial cases of conscientious objectors.[14]

[14] The *Statement* (Note 13, supra) includes the following summary of court-martial cases of conscientious objectors, compiled to June 7, 1919 (pp. 53-54):

| | |
|---|---|
| Tried by courts-martial | 504 |
| Acquitted | 1 |
| Convicted and sentenced | 503 |
| Disapproved: | |
| By reviewing authority | 3 |
| On recommendation of Judge Advocate General | 50 |
| Effective sentences | 450 |

ORIGINAL SENTENCES OF COURTS

| | | | | |
|---|---|---|---|---|
| Death | 17 | 2 years | | 3 |
| Life | 142 | 50 " | | 3 |
| 10 years | 89 | 8 " | | 1 |
| 20 " | 73 | 11 " | | 1 |
| 25 " | 57 | 12 " | | 1 |
| 15 " | 47 | 13 " | | 1 |
| 5 " | 29 | 18 " | | 1 |
| 30 " | 19 | 28 " | | 1 |
| 3 " | 5 | 45 " | | 1 |
| 1 year | 4 | 99 " | | 1 |
| 40 years | 4 | | | |
| Less than 1 year | 3 | | | 503 |

Records of the Office of the Judge Advocate General show that "since Pearl Harbor" the treatment of Jehovah's witnesses and conscientious objectors inducted has been severe.[15] To one not subject to duty of training and service imposed by the Act, the order to report for induction is the equivalent of an order banishing him from his position in society, and is, therefore, a very severe penalty, and one to which he should not be required to submit without opportunity for judicial review.

Often the court has held that the right to judicial review through writ of habeas corpus is merely nominal and illusory if the affected party can appeal to the courts only at risk of undergoing penalties so great that it becomes preferable to yield to orders of uncertain legality rather than to ask for protection of the law. To refresh the memory of the court, discussion of a few of those cases follows:

The respected precedent of many years' standing was

*(Concluded from preceding page,* NOTE 14)

SENTENCES AS FINALLY EXECUTED AFTER REVIEW BY REVIEWING AUTHORITIES AND BY JUDGE ADVOCATE GENERAL'S OFFICE

| | | | |
|---|---|---|---|
| 25 years | 166 | 50 years | 2 |
| 10 " | 94 | 35 " | 1 |
| 15 " | 65 | 8 " | 1 |
| 20 " | 49 | 11 " | 1 |
| 5 " | 32 | 12 " | 1 |
| 30 " | 18 | 13 " | 1 |
| 3 " | 8 | 18 " | 1 |
| 1 year | 4 | 28 " | 1 |
| Less than 1 year | 2 | Sentence disapproved and accused released | 53 |
| 2 years | 2 | Sentence suspended | 1 |
| | | | 503 |

| | |
|---|---|
| Sentences mitigated by reviewing authorities | 185 |
| Sentences mitigated on recommendation of Judge Advocate General | 11 |

[15] Brutality suffered at hands of military authorities by some of Jehovah's witnesses who reported for induction has also been noticed in the public press; e. g., *Time* magazine, April 19, 1943, p. 26.

announced in *Ex parte Young*.[16] The Minnesota legislature passed a law authorizing the Railroad and Warehouse Commission to fix rates which provided for the imposition of enormous penalties for violation of the regulations. The United States Circuit Court granted an injunction to the railroads restraining enforcement of the Act and Regulations as applied to plaintiffs' property because of their confiscatory nature. The state's Attorney General obtained a writ of mandamus in the state courts compelling the railroads to comply with the law. For this he was adjudged in contempt by the Circuit Court. He immediately applied to this court for a writ of habeas corpus. On the hearing he was remanded to custody of the marshal and this court held that the right of judicial review in the state courts in proceedings to collect the penalties was not sufficient to require the railroads to comply with the order or disobey it as a condition to obtaining review. The court[17] said: "A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

" . . . Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing

[16] 209 U. S. 123.

[17] 209 U. S. 123, at page 147.

upon the question whether the rates as provided by the acts are not too low, and therefore invalid. . . .

"We hold therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

Thereafter, in *Wadley Sou. Ry. Co.* v. *Georgia*,[18] the court found that the Georgia State Railway Commission was empowered by statute to treat all connecting carriers alike in regard to payment of freight in advance or on delivery and that it ordered railroads to cease demanding payment in advance. The act provided for a penalty for failure to comply with the orders. The court said: "But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available, but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. . . . He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

More recently, in *Okl'a Operating Co.* v. *Love*, 252 U. S. 331, the court reached a similar conclusion as to an Oklahoma statute that provided for certain laundry rates. The only

[18] 235 U. S. 651, 660-663.

way that the rate order could be reviewed was by appeal from the commission to the state supreme court on conviction for contempt by the commission for disobedience to the order. In sustaining the right of judicial review prior to obedience or disobedience to the order, the court struck down the inadequate provision of the Oklahoma legislature, saying: "So it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. The constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. (Article IX, ss. 18, 19) By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be $500; and each day's continuance of the refusal after service of the order it is declared 'shall be a separate offense.' The penalty may apparently be imposed for each instance of violation of the order. In *Oklahoma Gin Co.* v. *Oklahoma,* decided this day, post, 339, it appears that the full penalty of $500 with the provision for the like penalty for each subsequent day's violation of the order was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously, a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are un-

constitutional without regard to the question of the insufficiency of those rates."

On other occasions the court has held that where no adequate opportunity is afforded a person under an administrative law for a judicial review in advance of submission to or the incurring of possible penalties for disobedience of an administrative order such law is in contravention of due process of law. See *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 196, 207-208.

**E**

CONGRESS DID NOT INTEND TO WITHHOLD THE WRIT OF HABEAS CORPUS FROM AN EXEMPT PERSON WHO DOES NOT REPORT BECAUSE THE WRIT OF HABEAS CORPUS IS NOT A LITIGIOUS INTERRUPTION OF THE SELECTIVE SERVICE PROCESS.

Habeas corpus is not an administrative remedy but is a judicial process and forms no part of the administrative scheme envisioned by Congress. The court has uniformly held that a litigant seeking review for an administrative determination is not required to resort to some extraordinary method of judicial process, such as habeas corpus, as a condition precedent to enjoyment of other existing methods of obtaining judicial review. The court also has held that judicial remedies need not be exhausted before applying to federal courts for relief. *Lane* v. *Wilson*, 307 U. S. 268; *Railr'd & W. Comm'n of Minn.* v. *Duluth St. R. Co.*, 273 U. S. 625. The judicial maxim of exhaustion of administrative remedies is confined to *administrative* remedies provided under the Act. Petitioner was therefore under no obligation to report for induction and then apply for another judicial remedy. The Act does not require it, and certainly no rule of judicial construction authorizes it. He *could have* reported for induction and applied for a writ of habeas corpus, but the law did not require him to do so. The general law of the land provided for two methods of bringing him

before the courts or two remedies to obtain judicial review; and the law does not compel him to choose either remedy, and he certainly need not choose the weaker, habeas corpus, after induction, and incur great penalties and dangers.

Reporting for induction is not in every case the last step in the selective service process. That is particularly so in the case of a minister. Under the Act he is required only to register. Congress did not contemplate that a minister should report for induction. The rule of exhaustion of administrative remedies does not apply to one who is not subject to nor under any duty for service under the Act.[19] Certainly Congress did not intend that one exempt and not subject to the Act should incur penalties, and forfeit not only his exempt status under the Act but also surrender his civilian status as conditions to obtaining judicial review of the classification illegally given him by the local board.

The order to report is comparable to the judgment of a court.[20] To compel the exempt registrant to submit to an order to report for induction is identical to the condemned practice of forcing a defendant named in a void judgment to comply with it as a condition precedent to attacking it. Such a requirement violates the due process clause and subjects the aggrieved one to the pains and penalties of irreparable injury. The court has uniformly followed the practice of permitting stays of administrative orders pending a review thereof in the courts. To compel one to submit to the requirements of an administrative order makes void the purpose of judicial review.

The court has placed the position of the administrative agency above the position and dignity of the judiciary, holding that one who dares to transgress the 'sacred' decrees of wartime administrative agencies is guilty of such supreme contempt of *their* judicial powers that the federal courts

[19] *Gonzales* v. *Williams*, 192 U. S. 1.

[20] *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80; *Carolina Aluminum Co.* v. *Federal Power Comm'n* (CCA 4th) 97 F. 2d 435.

of the land will not grant judicial relief from their commitments for contempt until the unfortunate individuals, not subject to the jurisdiction of such agencies, have purged themselves of such contempt by compliance with the illegal orders of said boards. This places more dignity on the process of the administrative agency than that of a constitutional court. Heretofore the court has held that one committed for contempt of court for violating an injunction issued against him and from which he had not appealed could obtain relief and release by writ of habeas corpus, despite his defiance of the court, if it is shown that the committing tribunal did not have jurisdiction to issue the injunction.[21]

Regardless of whether the order to report is considered an interlocutory step in the integrating process of induction when the criminal sanction of the Act is invoked by proceedings in the district court based on the order, it became so severed from the administrative process as to make it final and permit a full inquiry on all questions affecting the validity of the order upon which the indictment is based. This conclusion is based upon *Cobbledick* v. *United States,* 309 U. S. 323, squarely in point, where it is said: "At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail." It is clear that if this type of review of contempt orders of courts is allowed, by the same token a like power is vested in the courts to review the proceedings brought to punish a person for contempt of the administrative agency.

In view of the fact that Congress provided exemption from all service for ministers and guaranteed a type of lim-

[21] *In re Burrus,* 136 U. S. 586. See, also, *Ex parte Fisk,* 113 U. S. 713, 718, and *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16, where similar conclusions were reached.

ited noncombatant service for conscientious objectors, it is altogether reasonable to conclude that Congress certainly did not intend that either the minister or the conscientious objector should report for induction as a condition to claiming his proper status under the Act. While Congress may have intended that persons liable for training and service under the Act should report before testing their classifications, it is certain and reasonable that Congress did not intend that persons it had specifically exempted from service should report as a condition precedent to claiming these rights under the Act. It is vain to argue that Congress intended, as a penalty, to deny the right to claim exemption from total duty for having failed to report as illegally ordered by the local board. Congress did not intend that in every case the action of the boards would be conclusively presumed to be correct and beyond judicial attack. Certainly Congress was aware that members of draft boards would be imperfect and subject to error and prejudice even as other men and that they would not be free from factional interests. It knew that the draft boards would not be so Utopian and contrary to human experience. Therefore the district courts were specifically designated to effect justice to all exemptions under the Act, which duty necessarily requires them to weigh and decide conflicts between boards and registrants claiming exemption, in determining guilt of one charged with violation of the law. The courts below have conclusively presumed the respective boards to have been correct in the treatment of petitioner's claim, and thus implied that the boards were composed of perfect men free from vice and error.

Knowing the meticulous care exercised by Congress when attempting through this Act to protect the rights of conscientious objectors and ministers of religion, justice proceedings are turned into a mockery when it is said that the lawmakers intended to place an insurmountable procedural obstacle in the path of such persons exempt or deferred in

the Act. One who continues to assert his right of conscience or his right of exemption as a minister against an arbitrary denial of the right by the boards is left only the choice of abandoning his conscience and his exemption and thus securing judicial review, or of following his conscience and exemption inevitably to jail.

There is absolutely no basis in reason or fact for any conclusion that there is a clear and present danger that the raising of the armed forces will be impaired or frustrated by permitting inquiry by habeas corpus after conviction on the ground that he has no duty under the Act because exempt. There is less likelihood of any such danger through allowing habeas corpus than there would be frustration of training program of the armed forces and camp operators under the Act by permission to test out the classification after induction. It is openly manifest that Congress intended to keep out of the forces raised under the Act for service all controversies concerning classification, and that such should be settled between the registrant and the Selective Service System in the district courts.

The number of persons eligible for exemption under the Act, including judges, legislators, governors, and ministers (including all of Jehovah's witnesses who are of draft age), comprise but a very small percentage of the population subject to the Act. There has been no rebellion from duty because of these exempting provisions. Since the exemption is provided in the law, it cannot be said by any reasonable person that the allowance by Congress of the right to show and protect one's exempt status in court would constitute a clear and present danger of a breakdown of the Selective Service System or the armed forces.

Since it is obvious to reasonable men that a delinquent cannot get into the army once he has been found delinquent and prosecuted for violation of the act in a manner that is certain to send him to the penitentiary, it cannot be argued that the petition for writ of habeas corpus is a "litigious

interruption" of the selective process. It is not any more an interruption of the process than were the habeas corpus proceedings in *Ex parte Crow Dog,* 109 U. S. 556, an interruption of the funeral proceedings and burial of the person killed by Crow Dog.

**F**

THE RIGHT TO APPEAL FROM THE CONVICTIONS DOES NOT INHIBIT ISSUANCE OF THE WRIT OF HABEAS CORPUS AND THE CONSTRUCTION PLACED UPON THE DRAFT ACT IN THE CASE OF FALBO V. UNITED STATES MAKES THE WRIT OF HABEAS CORPUS MORE IMPERATIVE.

The line of cases holding that the writ of habeas corpus is not available after a conviction to review errors of judgment committed upon the trial of the case[22] do not control here. In the first place, the allegations here charge that upon the trial each registrant was denied his right of a judicial trial and the Act was construed and applied to violate the inherent constitutional rights of the defendant so as to make void the judgment and to open it to collateral attack. The cases at bar fall within the exception to general rule.[23] In the second place, the matter of the illegal classification and invalidity of the order to report has been held not to be available in defense to the indictment or upon an appeal, therefore the general rule does not apply. Furthermore, the petition for the writ challenges the administrative proceedings and order and the writ is available to test them irrespective of the subsequent district court proceedings.[24]

Since the decision in *Falbo* v. *United States* is not determinative of the issues and the denial of the defense to the indictment was sustained, there is created thereby a more imperative demand for the writ of habeas corpus for the purpose of reviewing the order of the draft board upon

[22] *Glasgow* v. *Moyer,* 225 U. S. 420; *Matter of Gregory,* 219 U. S. 210.
[23] See the many cases cited and discussed, supra, this brief, pp. 13-20.
[24] See the habeas corpus cases discussed at pp. 21-28, this brief.

petitioner was reported to the district attorney as a delinquent because he refused to obey the illegal order and which the indictment is based. By reason of the fact that in view of the action of the Department of Justice upon such report by arresting and proceeding to indict the petitioner, there is created a clear, immediate and great need for the writ of habeas corpus. He has been forced to undergo a trial by ordeal and suffer pains and penalties inflicted under an act of attainder because conviction will be inevitable and he will be denied the right to be heard in his defenses. See the brief supporting petitions for writs of certiorari in the cases styled *Clayton* v. *United States* and *Stull* v. *United States,* companion cases to the two herein argued.[25]

The petitioner, to protect his liberty, may invoke the powers of judicial review of the administrative action in the same way and to the same extent that persons have been permitted to invoke other *chancery writs* to protect their property from administrative action, such as the writ of injunction, without compliance with the administrative order prior to invoking the judicial powers of the federal courts. *Federal Radio Comm'n* v. *Nelson Bros. Bond & M. Co.,* 289 U. S. 266, 278; *Chicago, M. & S. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 456-457; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; and *Shannahan* v. *United States,* 303 U. S. 596.

Under statutes where administrative or judicial remedies are provided which subject the persons affected to heavy penalties or even light burdens as a condition precedent to judicial review the court has repeatedly held that the remedy of injunction in chancery is available to obtain

[25] In addition to the many cases and authorities cited in the brief in those cases showing that the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 is a bill of attainder because not requiring and doing away with a judicial trial, see *In re Yung Sing Hee,* 36 F. 437; *Davis* v. *Berry,* 216 F. 413; *Pierce* v. *Carshadon,* 16 Wall. 234; *Calder* v. *Bull,* 3 Dall 386; *Green* v. *Shumway,* 39 N. Y. 423; *Kentucky* v. *Jones,* 10 Bush (70 Ky.) 725; *Gaines* v. *Buford,* 1 Dana (31 Ky.) 481, 510; *Watson on the Constitution* (Callaghan & Company), Vol. 1., pp. 733-739.

judicial review of the administrative action questioned prior to compliance therewith. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 196, 207-208; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Wadley Sou. Ry. Co.* v. *Georgia*, 235 U. S. 651, 660-663; *Ex parte Young*, 209 U. S. 123, 147. Since habeas corpus, another chancery writ, stands on a much stronger ground, the Constitution, as a basis for protection of liberty of the person, than does the remedy of injunction, it must be assumed that the court will hold that it is available to protect one from execution of administrative agencies which leads either to the guardhouse of the armed forces or the prisons of the Department of Justice. *Crowell* v. *Benson*, 285 U. S. 22, 58; *United States* v. *Idaho*, 298 U. S. 105.

Petitioner's claim that the draft boards' proceedings and order were the result of arbitrary and capricious action in violation of his rights secured by the due process clause of the Fifth Amendment and without according a fair hearing consistent with the "rudimentary demands of justice" is in effect a charge that the proceedings before the administrative agency was "an empty shell". (*Frank* v. *Magnum*, 237 U. S. 309, 345; *Bowen* v. *Johnston*, 306 U. S. 19, 26) The vital and substantial writ of habeas corpus cannot be frittered away on technical grounds or rules of convenience and of non-interference with administrative agencies.

The impending penalties of the administrative action by prosecution of petitioner under the criminal sanctions clause of the Act results in the deprivation of his personal liberty and his civil rights—an illimitable injury from which recovery is hopeless. The prosecution has the same banishing effect upon the defendant and removes him from society in much the same manner as does the deportation from the country of a person alleged to be an undesirable alien. It is necessary that habeas corpus be allowed to give relief for the same reason and same purpose to the person exempt

from the liability for duty under the Act as the relief granted to the citizen wrongfully confronted with deportation. In each instance the administrative agency is without jurisdiction and if the court so finds upon the hearing of the writ it is the duty of the court to release the petitioner. *Lloyd Sabaudo* v. *Etling,* 287 U. S. 329; *Gonzales* v. *Williams,* 192 U. S. 1; *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; *Kessler* v. *Strecker,* 307 U. S. 22, 34-35.

The petitioner has been caught up in a rapidly moving piece of military machinery specifically designed for speed so as not to allow judicial trial in defense to the indictment on the question of the invalidity of the order of the board which instituted the proceedings. This placed him in the position of inevitable conviction and destruction of his rights of citizenship without the right to question the action of the board. He is certain to suffer pains and penalties of a modern-day trial by ordeal and by bill of attainder. It is from this predicament and type of proceedings that the ancient writ of habeas corpus first came into use. The writ was regularly employed by the chancellors to rescue the common people of England from the trials by ordeal and battle then in vogue in certain parts of England. It is respectfully submitted that the method of trying cases under the Act in question so as to deny the fundamental defense is nothing but a revival of the trial by ordeal. (See brief in the *Clayton* and *Stull* cases.) The trials are in violation of due process of law guaranteeing the right to be heard in defense to an indictment. (See brief in the *Clayton* and *Stull* cases.) The proceedings under the Act are contrary to Clause 3 of Section 9 of Article I of the United States Constitution because they are by bill of attainder in which all semblances of a judicial trial are done away with.[26]

Under this type of proceedings under the indictment it is imperative that the writ of habeas corpus be granted so

[26] See brief in companion cases of *Clayton* and *Stull.*

as to protect the rights of petitioner from gross violations of his constitutional rights.

Prior to the date set for induction by the board the petitioner was faced with a choice of taking a course that would lead him either into the military machinery, with loss of civilian rights and possible death penalty on court-martial proceedings for claiming his exemption and civilian rights, or into the hands of the Department of Justice to be convicted by bill of attainder in the district court. The right to the writ of habeas corpus, after induction growing out of penalties far more severe than could be inflicted in the district court, is thus nominal and illusory and fraught with difficulties and penalties so great that it is better to refuse to obey the order of uncertain legality rather than ask for protection of the writ of habeas corpus after induction. "He must either obey what may finally be held to be a void order or disobey what may ultimately be held to be a lawful order." (*Wadley Sou. Ry. Co.* v. *Georgia*, 235 U. S. 651, 663) "Obviously, a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the act relating to the enforcement . . . are unconstitutional." (*Okl'a Oper'g Co.* v. *Love*, 252 U. S. 331)

## POINT TWO

**This Court should hold that each petition for writ of habeas corpus alleged a cause for action and issuance of the writ because the admitted facts alleged showed that each petitioner was a minister of religion completely exempt from liability for induction, training and service under the Act and their draft boards did not have jurisdiction to order them to report, and that the boards acted in excess of authority, contrary to law, without substantial evidence, contrary to the undisputed evidence, arbitrarily and capriciously, and denied petitioners their rights and liberty without due process of law, contrary to the Fifth Amendment;**

**therefore the court below erred in affirming the judgment and this court, in the exercise of its discretion, should grant the writs.**

In determining the question of whether the district court erred in refusing to issue the writ and in dismissing the petition the court must accept all the allegations made in the petition as true. All reasonable intendments must be indulged in favor of the petition. The court in determining the legal effect of the facts alleged must consider them as conceded and true. *Truax* v. *Corrigan,* 257 U. S. 312, 332; *Mackay* v. *Dillon,* 4 How. 431; *Dower* v. *Richards,* 151 U. S. 658, 667; *State of Arizona* v. *State of California,* 284 U. S. 203; *Payne* v. *Central Pac. R. Co.,* 255 U. S. 228, 232. See also *Pyle* v. *Kansas,* 317 U. S. 213, and *Waley* v. *Johnston,* 316 U. S. 101. In *Holliday* v. *Johnston,* 313 U. S. 342, the court said "a petition for the writ ought not be scrutinized with technical nicety".

Each district court should have granted the petition for writ of habeas corpus and reviewed the draft board proceedings, findings and order because it appears from the face of the petition that the same are void because they are (1) in excess of authority of the board, (2) beyond the jurisdiction of the board, (3) contrary to law, (4) without substantial evidence to support the action taken, (5) contrary to the undisputed evidence, (6) contrary to the Constitution by depriving the petitioner of rights and liberty without due process of law, and (7) arbitrary and capricious.

An independent inquiry can be made by the district court on any of the above matters, and in deciding the questions it is not bound by the findings or determinations of the administrative agency, because each of the questions involved is judicial in its nature and none are administrative discretionary matters.

## A

SINCE EACH PETITIONER IS A MINISTER OF RELIGION EXEMPT FROM TRAINING AND SERVICE UNDER SECTION 5 (D) OF THE ACT AND THE REGULATIONS THEREUNDER THE DRAFT BOARDS ACTED IN EXCESS OF THEIR AUTHORITY AND BEYOND THEIR JURISDICTION IN ORDERING EACH PETITIONER TO REPORT AND ACCORDINGLY THE ADMINISTRATIVE PROCEEDINGS AND THE ORDER OF THE AGENCY ARE VOID AND ILLEGAL.

When one is of a class of persons expressly exempted by an Act of Congress from any duty thereunder an agency charged with administering the act has no jurisdiction to direct the exempted person to perform duties required of those subject to the act. The anomalous position of the Respondents on this question is contrary to an old and unanimous Supreme Court opinion in *Wise* v. *Withers,* 3 Cranch 331. There the Militia Act of 1792 exempted officers of the federal government from training and service. Wise, a justice of the peace of the District of Columbia, refused to report for induction as directed by the administrative tribunal. He was proceeded against according to the statute before the military tribunal and his property confiscated. Chief Justice Marshall, speaking for the court, held that a justice of the peace of Washington, D. C., was a federal officer within the meaning of the act and hence the tribunal was without jurisdiction to order Wise to report. The court said that the order was void and was, therefore, subject to a collateral attack.

History of prior draft and militia acts of this country fails to reveal any case where a minister has had a controversy with draft authorities in the courts as to his ministerial exempt status. It is assumed that it was so plain that no "board" has dared to transgress the acts of Congress creating the exemption. The only case to be found in the state reports involving the militia acts is that by the Supreme Court of Alabama in the case of *Ex parte Cain,* 39 Ala. 440, 441, holding that a draft board, under the con-

scription act of the Confederacy during the Civil War, did not have jurisdiction to induct a minister for military service. This indicates that there can be no distinction between exempt status of a federal officer and the exempt status of a minister of religion.

By terms of the Selective Training and Service Act "regular and duly ordained ministers of religion" are exempt from training and service and are, therefore, beyond the induction process of the local boards. "There are included in the legislative exemptions those classes whose status is determined in such a way that the administrators of this law can take cognizance of that status and eliminate them."[27]

All the Act requires of a minister is to register with his local board so that the Selective Service System has a record of him as a *minister*. Each "minister of religion" fills out a questionnaire and in the space provided (Series VIII. See Ap. C., pp. 12-16.) may state that he is a *minister of religion*. The power of the board to decide the claim of exemption does not expand the jurisdiction of the board to a point of allowing the induction of a minister, exempt from training and service. Petitioner's claim for statutory exemption because of occupying the office of *minister* is fixed, definite and certain; and can be as easily determined as the claim for statutory deferment made by a governor, judge, congressman, state legislator or vice-president of the United States.

Congress has determined the exempted class. If in fact one is a minister, duly recognized by his denomination, the board has no discretion to deny the claim. The making of the claim for exemption as a minister is tantamount to making a claim that the local board does not have jurisdiction over the individual making the claim. The board has the duty and the power to determine this *plea to its jurisdic-*

[27] General Crowder, Provost Marshal General, testifying before the Committee on Military Affairs of the House of Representatives when the Selective Training Act of 1917 was being considered.

*tion;* but the fact that it decides that it has jurisdiction to induct does not give it such jurisdiction. The making of the plea to the jurisdiction by a minister is analogous to a defendant making a plea to the jurisdiction of a court. If the court is without jurisdiction to render a final judgment against defendant, its findings and judgment are void and may be collaterally attacked in another court anywhere at any time. When a local board orders a "minister of religion" to report for induction it is equally as void as a judgment of a justice of the peace rendered on default of defendant for $1,000,000 or for title to real estate. If a justice of the peace should entertain such suit or action against another, the defendant has the right to appear and file a plea in abatement, a plea to the jurisdiction of the court. The fact that the defendant files such a plea does not confer jurisdiction upon such justice of the peace regardless of whether the plea is overruled or sustained. The draft board entering a proper IV-D classification for an ordained or regular minister acts in the same manner as the justice of the peace in sustaining the plea to his jurisdiction. Denial of the claim does not confer jurisdiction on the board to induct the registrant to perform service under the Act, any more than would the denial of the plea to the jurisdiction of the justice of the peace give him jurisdiction.

An ambassador to the United States from another nation is exempt from all courts inferior to the federal supreme court. Suppose an ambassador were sued in some inferior court. Without doubt he could question the jurisdiction of that court. That the inferior court has the privilege of hearing and deciding a plea to the jurisdiction does not give that court jurisdiction over the ambassador. If a defendant in such a circumstance impersonated an ambassador and *falsely* made the claim, such inferior court could find the claim to be fictitious and on that ground overrule the plea to the jurisdiction.

The same analogy applies to the power of the local board

when one claims exemption because an ordained minister, or deferment because a judge, legislator or governor. If a man is in truth and in fact authorized by a recognized Christian organization, there is only one thing a board can do when he claims ministerial exemption from service, and that is to place him in Class IV-D. If the claim for exemption is falsely made or is fictitious, then and only then can the board deny the claim. But in such instance he must be found guilty of false swearing or perjury in his claim, because until his claim is impeached or controverted by *written evidence* in his file he is entitled to the exemption claimed. Before any court or board can reject the claim for ministerial exemption it must be established that the registrant or defendant has violated the provisions of the statute forbidding false swearing. A board has no discretion to decide whether it will give the vice-president of the United States a deferment or deny a "minister of religion" an exemption granted by Congress. Until the claim is impeached as a *false claim* the board has no discretion to deny it.

The *discretionary* decision of draft boards in reference to classifications of persons under a duty for training and service pursuant to the Act and Regulations is, under decisions of this court on administrative law, final unless unsupported by substantial evidence, arbitrary and capricious or made in violation of procedural due process. However, this rule does not cover the action of the boards in reference to classifications contemplated by the statute entirely exempting and removing registrants from duty under the Act. In such cases the boards are responsible to the United States courts for a proper adherence to the statute, as much as to the classification to be given designated groups as to their personnel arrangements. The distinction is well stated in *Crowell* v. *Benson*, 285 U. S. 22, 63, by Chief Justice Hughes: "The question in the instant case is not whether the Deputy Commissioner has acted improperly or arbitrarily as shown

by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable."

The question as to the inherent power of the administrative agency to act in respect of the subject of registrants' duty for training and service depends upon the facts before it. If the facts show that a duty exists, there is jurisdiction and power of the administrative agency to act. If the facts do not exist to show duty and establish exemption, there is no jurisdiction or power to order such registrant to report for training and service. In the field of administrative law these considerations are known as "jurisdictional facts".

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Crowell* v. *Benson,* 285 U. S. 22, 54.

The distinction made in the *Crowell* case, supra, has been applied in a wide variety of administrative law cases. Brief discussion of a few is sufficient to demonstrate the need for application of the rule to the instant controversy.

In cases concerning validity of administrative orders deporting aliens, the court has repeatedly held that such agencies have no authority to deport a citizen and that the making of the claim of citizenship supported by substantial evidence thereof constitutes a denial of jurisdiction and the finding of the agency on such 'jurisdictional fact' is not binding on the court and can be determined in a judicial trial *de novo.* In an action brought under Section 9 of the Immigration Act to recover penalties (analogous to the criminal action here), the court said: "The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority." *Lloyd Sabaudo* v. *Etling,* 287 U. S. 329. The same rule was followed in the earlier case of *Gonzales* v. *Williams,* 192 U. S. 1, 15.

In *Kessler* v. *Strecker,* 307 U. S. 22, 34-35, it was

declared: "The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of jurisdiction conferred upon the Secretary." Mr. Justice Brandeis, in *Ng Fung Ho* v. *White,* 259 U. S. 276, at page 284, said: "The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service."

The court ruled in the military cases that when enlistment is denied such is a denial of jurisdiction and is a jurisdictional fact for determination by the court *de novo* without limitation by the determination made by the military agency. Likewise denial of induction authority by claiming exemption raises a question of authority of the board to act and is a jurisdictional fact to be determined by the court. *Ver Mehren* v. *Sirmyer,* 36 F. 2d 876, 882; *Givings* v. *Zerbst,* 255 U. S. 11, 20; *In re Grimley,* 137 U. S. 147.

In the administration of the public land system questions of fact are for determination of the Land Department. The determinations of that agency are conclusive. It is equally true that if lands never were public property, have been previously disposed of, or if Congress had not made provision for their sale, or exempted them for sale, the department has no jurisdiction to sell or transfer such lands. Determination in such cases is not binding on the courts, and an inquiry can be made upon a trial *de novo* in proceedings brought to attack collaterally the order of the department. *Smelting Co.* v. *Kemp,* 104 U. S. 636, 641; *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165; *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10; *Morton* v. *Nebraska,* 21 Wall. 660. Typical of the rulings in these cases is *Burfenning* v. *Chicago St. P. R. Co.,*

163 U. S. 322, 323, where it is said: "But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof." This language is appropriately apposite to this case concerning limitation of the authority of the draft boards in dealing with ministers of religion who are exempt from duty under the Act.

In workmen's compensation cases there are certain facts which must exist before the operation of the statutory scheme can begin. As to such 'jurisdictional facts' the final arbiter is the court, not the agency. *Crowell* v. *Benson,* 285 U. S. 22. So also is the rule in *abandonment of line* cases concerning Interstate Commerce Commission determinations, such as whether trackage is "spur" or "industrial". In *United States* v. *Idaho,* 298 U. S. 105, 109-110, the court said:

"Appellants object that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Gagg Bros.* v. *United States,* 280 U. S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court; not to the final determination of either the federal or a state commission." This particular quotation should show conclusively the error of the district court in excluding all the evidence

offered by petitioner to show proof of his ministry and exempt status under the Act. On January 3, 1944, the *Falbo* case decision date, this high court approved the *Idaho* case, saying, *inter alia:* "Congress has not left that question exclusively to administrative determination; it has given the courts the final say." *City of Yonkers* v. *United States,* No. 109 October Term 1943.

Under the Interstate Commerce Act and related statutes the following questions have been held to be for final determination by the courts, whose judgments are not bound by the findings of the administrative agency, that is to say, whether a party is a "person"; whether a person is a "shipper"; whether a party is a "common carrier", a "carrier by railroad", or a "carrier involved"; whether two railroads not actually contiguous are "connecting carriers"; whether person is "intermediate carrier".[28]

Even the unauthorized issuance of a patent is not conclusive upon the judgment of the court. *Doolan* v. *Carr,* 125 U. S. 618-625. Whether a vessel is actually "captured" is a jurisdictional fact on which the determination of the prize court is not conclusive. *Rose* v. *Himely,* 4 Cranch 241, 269.

**B**

SINCE EACH PETITIONER IS A MINISTER OF RELIGION EXEMPT FROM TRAINING AND SERVICE UNDER SECTION 5 (D) OF THE ACT AND THE REGULATIONS THEREUNDER THE DRAFT BOARDS DENIED EACH OF THEM HIS LIBERTY AND RIGHTS WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT BY ORDERING HIM TO REPORT FOR INDUCTION AND INSTITUTING DELINQUENCY PROCEEDINGS AGAINST HIM.

Assuming *arguendo* that this Court can correctly reach the conclusion that the exemption provided by Congress

[28] For the cases on these and other questions, the Court is referred to *Federal Administrative Law* (Vom Baur, 1942) Vol. 1, pp. 461-462. For a listing of the many other administrative determinations that are subject to judicial review see pp. 434-472 *op. cit.,* particularly the discussion of questions under the National Labor Relations Act, p. 465 *op. cit.*

in this case does not convert a determination thereon by the draft boards into one on "jurisdictional facts" under the above cases, it is still contended that the courts have authority to review the draft boards' determinations because there is presented a judicial and constitutional question of whether the petitioner has been denied his rights and liberties without due process of law. No ranker violation of the due process clause can be imagined than that of illegally and arbitrarily removing all rights of citizenship from an individual, denying him his liberty and placing him in a status subject to military jurisdiction without some means of judicial review. The fact that he is liable to lose his liberty, either through induction or prosecution, presents a justiciable constitutional question under the due process clause of the Fifth Amendment. It is therefore for the courts to decide whether petitioner is threatened with loss of liberty or has been actually denied liberty without due process of law in view of the fact that he is not under duty for training and service.

In *Crowell* v. *Benson,* 285 U. S. 22, 56-57, the Chief Justice summarizes the whole matter: "It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of facts upon which the enforcement of the constitutional rights of the citizen depends. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government

of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Again, in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 50-52, the Chief Justice said: "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The courts have continuously and consistently provided judicial review and protection so as to prevent the confiscation of property without due process of law by payment of a fair price or allowing fair returns.[29]

[29] *St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S. 649; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349; *Federal Administrative Law* (Vom Baur, 1942) Vol. 1, pp. 337-404.

## C

SINCE EACH PETITIONER IS A MINISTER OF RELIGION EXEMPT FROM TRAINING AND SERVICE UNDER SECTION 5 (D) OF THE ACT AND THE REGULATIONS AND THERE WAS NO EVIDENCE TO DISPUTE SUCH FACT BEFORE THE LOCAL BOARDS, EACH BOARD ACTED ILLEGALLY BECAUSE THE CLASSIFICATION AND ORDER OF EACH PETITIONER WAS WITHOUT SUPPORT OF EVIDENCE, CONTRARY TO THE UNDISPUTED EVIDENCE AND ARBITRARY AND CAPRICIOUS.

Even where the courts have found no erroneous decision on a jurisdictional fact or a constitutional question, a review of the administrative determination has always been permitted where the particular finding or order affecting the substantial rights of the party is shown to be arbitrary and capricious or that in arriving at such determination the administrative agency violated procedural due process in conducting the administrative proceedings. Therefore if the Court concludes that the statute confers no extraordinary right on petitioner by providing for the exemption of ministers of religion and that the determination of his classification is similar to that of all other registrants not favored by the statutory exemption, it is nevertheless the duty of the Court to permit a review in defense to the indictment on this consideration alone.

Each of the petitioners showed conclusively that he was a minister of religion and exempt. There was not one scintilla of evidence or testimony offered before either the local board or the trial court that petitioner was not a minister of religion. Nor did anyone claim that he fictitiously made the claim for exemption as such. Had there been any such evidence, it would have been the duty of the boards to reduce it to writing and place it in the files.[30] There is no written report of any such evidence in the files of the local board.[31]

[30] Reg. s. 623.2. See also Opinion No. 14, par. 6, at pp. 57-60 of separate APPENDIX to petitioner Clayton's brief filed in the court below.

[31] Cf. petition for writ of habeas corpus, APPENDIX *Lohrberg* and APPENDIX *Falbo*.

Therefore, for the purpose of deciding this case on the undisputed evidence and record before the court it must be conclusively assumed that petitioner is a minister of religion within the meaning of section 5 (d) of the Act.

In the *Falbo* opinion it is said: "Petitioner, 25 years of age, unmarried, and apparently in good health, registered with his local board on October 16, 1940." His age, marital status and condition of health do not in any degree affect his exempt status as a minister, any more than the age, condition of health, etc., would affect the exempt status of one of the justices of the court under the Act. Even the most disingenuous person knows that a man may be a minister of religion and competent to discharge his duties as such regardless of whether he is 25 years of age, married or unmarried, and "apparently in good health". Even a *peg-legged* man can be a minister as well as an able-bodied man. These factors do not constitute adequate proof against the exempt status of petitioner or his claim under the Act.

Still assuming, for the purposes of argument only, that the decision of the local board on the question presented was one not jurisdictional or not constitutional, but one of administrative discretion, it is necessary to determine whether or not the classification, finding and order of the board was based on substantial evidence. If it is found that it is not, then it is the duty of the court to discharge the petitioner or at least permit a judicial review of the question before petitioners can be remanded. There must be a rational basis in evidence for the conclusions reached by the administrative agency.[32]

This is the only court that has manifested the courage to permit one indicted for failure to respond to an induction order of a draft board to show in defense that the order is illegal, has accordingly concluded that the least per-

[32] *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See also *Federal Administrative Law* (Vom Baur, 1942) Vol. 2, pp. 564-385.

missible inquiry on such a trial is whether the classification and order were made arbitrarily and capriciously.[33]

It has been held that the court must examine the evidence to determine if there is substantial evidence to support the finding. *Substantial* evidence is more than a mere *scintilla.* It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The first duty of the draft board under the Regulations was to examine the questionnaire submitted by petitioner to see if there was any evidence that justified placing him in some classification that would exempt him from duty under the Act. It was the affirmative duty of the local board and likewise the appeal board to place petitioner in class *IV-D* unless they could find substantial evidence that he was not a minister of religion.[34]

There was not one iota of evidence that petitioner was not a minister. On the contrary, the undisputed evidence before the board showed he was a minister of religion. The finding and subsequent order of induction by the board is unsupported by substantial evidence and against the weight of the uncontradicted evidence, and therefore put petitioner under no legal obligation to respond.[35]

Where a commissioner of immigration ignores the question presented to him, as did the draft board here, and the evidence pertaining to it, as here, and takes away the right of hearing, the commissioner's order was held void. *White* v. *Chin Fong,* 253 U. S. 90.

The rule with respect to a jury verdict in judicial proceedings is substantially the same. *Gunning* v. *Cooley,* 281 U. S. 90.

An administrative order that is based upon a finding

[33] *Baxley* v. *United States* (CCA-4), 134 F. 2d 998; *Goff* v. *United States* (CCA-4), 135 F. 2d 610.

[34] Reg. s. 623.21, 627.25, 627.26. See also Lewis, "Appeal Procedure Under the Selective Service Law" (1942), 17 Ind. L. J. 273, 281-282.

[35] *W. V. & Couch Co.* v. *N. L. R. B.,* 301 U. S. 142, 147; *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 229, 230; *Spiller* v. *A. T. & S. F. R. Co.,* 253 U. S. 117.

on an administrative question, and is not supported by substantial evidence, must be set aside by the judiciary as arbitrary and capricious and as constituting a denial of due process of law.[36]

Where the hypothetical statement of facts set forth in an opinion by the head of an administrative agency, such as Opinion No. 14 of National Headquarters of Selective Service System concerning Jehovah's witnesses, is indistinguishable on the facts of the case of petitioner before the boards, and such boards reject the opinion and set up their own standards of behavior and classification, as did the boards here, the orders issued thereafter are null and void and must be set aside by the judiciary as arbitrary and capricious.[37]

It is submitted that for draft boards "to rest their interpretation of statutes on nothing but their own conception of 'morals' and 'ethics' is, to say the least, dangerous business." (Mr. Justice Black in *The Mercoid Corporation* v. *Mid-Continental Investment Company,* Nos. 54 and 55, October Term, 1943, U. S. Supreme Court.)

## POINT THREE

**This Court should hold that each petition for writ of habeas corpus alleged a cause for action and issuance of the writ because it appears that each petitioner was subjected to a trial by bill of attainder, denied his right to a judicial trial, denied his right of trial by jury, denied**

[36] *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103; See Mr. Justice Pitney's statement in *L. & N. R. Co.* v. *Finn,* 235 U. S. 601, 606. Cf. *R. R. Comm. of California* v. *Pac. Gas & Elec. Co.,* 302 U. S. 388.

[37] *Miller* v. *Standard Nut Margarine Co.,* 284 U. S. 498.

**his rights and liberty without due process of law under the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 which is constitutional, all contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution and the Fifth and Sixth Amendments thereto; therefore the court below erred in affirming the judgment and this court, in the exercise of its discretion, should grant the writs.**

As construed and applied by the Supreme Court of the United States, Section 11 of the Selective Training and Service Act of 1940 has been converted into a bill of attainder contrary to Clause 3 in Section 9 of Article I of the Constitution of the United States which reads: "No bill of attainder or ex post facto law shall be passed." We have argued this question at length in the brief filed for petitioners in the cases of *Stull* v. *United States* and *Clayton* v. *United States,* the companion cases to these cases, to which reference is here made. Furthermore, each prisoner has been denied his rights of a jury trial, his right to be heard in his defenses, his right to a judicial trial and his liberty without due process of law by the action of the trial court upon the trial of the indictment, which excluded all evidence tending to show that the action of the draft board was illegal and in submitting the case to the jury charged the jury that it could only consider the question of whether or not the registrant reported for induction as ordered and that it could not consider whether the accused was exempt from training and service. It is claimed that this action violated the constitutional rights of the prisoners to such an extent that each judgment attacked by the respective petitions is void and subject to collateral attack, and contravenes the Third Article of the Constitution of the United States and the Fifth and Sixth Amendments thereto.

The rule stated in *Falbo* v. *United States* turns upside down the rule of final judgments of courts and administra-

tive agencies. It compels one to submit to the satisfaction or execution of such orders and judgments prior to obtaining relief. This is contrary to all precedent, reason and justice. The rule of "non-interference" with interlocutory orders of administrative agencies applied by this court in civil cases does not control here. In those cases a final hearing was contemplated and a final order to follow. Here all hearings have been completed and the order entered is final. It is highly inconsistent to hold that one exempt from the Act must either submit to the illegal order or else be penalized by denial of his defenses upon a trial of an indictment charging him with violation of the illegal order. The holding discriminates between those persons who comply with the illegal orders and those who choose to claim their legal rights under the Act and challenge the unlawful order, thus denying "equal justice under law".

In discussion of a statute fixing rates of a railway the court implied that a railroad which defied the legislative mandate would have the right to assert the unreasonableness and illegality of the rates in defense to actions brought to recover the penalty for failure to comply therewith.

*St. Louis & San Francisco Ry.* v. *Gill,* 156 U. S. 649, 666, where it is said: "... and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

The court has heretofore condemned action very similar to that approved in this case and refused to construe a statute so as to permit such results, in *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 351-352, saying: "Despite the broad language of s. 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not

destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law'. Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 307; Panama R. Co. v. Johnson, 264 U. S. 375, 390; Blodgett v. Holden, 275 U. S. 142, 148. When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, *the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled.*" (Italics added)

The court has repeatedly held that the failure of Congress to provide for judicial review of administrative orders in the Act creating the agency does not preclude judicial review as and when the district courts otherwise acquire jurisdiction of the controversy. In *Dayton Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, at page 486, the Chief Justice said: "No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under . . . the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution."

Disregarding similar arguments made against judicial review, the court in *Federal Radio Comm'n* v. *Nelson Bros. Bond & M. Co.,* 289 U. S. 266, 278, said: "If the questions of law thus presented were brought before the court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that fact is not altered by the mere fact that remedy is afforded by appeal. . . . We must not 'be misled by a name, but look to the substance and intent of the proceeding'. *United States* v. *Ritchie,* 17 Howard 525, 534; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 479."

Judicial review has been held to be vitally necessary, regardless of failure of the legislature to provide for it, and even in cases where the legislature has denied a review by the courts. This is because due process of law guaranteed by the Constitution makes it mandatory. The court has many times struck down state statutes as unconstitutional that denied the right of judicial review of administrative action. Long ago, in *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, at pages 456-457, the court had under consideration the Minnesota Railroad and Warehouse Commission Act which provided that transportation rates shall be final and conclusive when fixed by the commission and that no judicial inquiry thereof was permitted. Following the statute, the trial court excluded all evidence on the question of legality of the rates. After reviewing the construction placed on the Act by the Minnesota courts, Justice Blatchford for the court decreed: "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Again, in *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, at page 289, a similar law was considered and

declared unconstitutional on the same grounds. The court said: "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

"The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. . . . In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

The rights and liabilities of the selectee under the Act must be determined as of the day that he failed to report. If the law imposes criminal sanctions for his act and conduct as of that day, without providing for a judicial hearing as to his guilt or innocence, it denies to him a trial according to due process of law. In *McVeigh* v. *United States,* 11 Wall. 259, at page 267, Mr. Justice Swayne said: "If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

Aside from the established rules of evidence, reason and common sense dictate that the trial of a criminal indictment should be *de novo* and the trial court is bound to exercise its independent judgment and be guided by the ordinary rules of criminal procedure which provide for more liberal protection of rights of the accused than do the rules of civil procedure.

The criminal prosecution under the Act (Section 11) is by no stretch of the imagination a "litigious interruption" of the selective process. It is assuming a position contrary to the criminal sanctions clause itself to contend otherwise. If the prosecution of the indictment provided for in Section 11 does not interfere therewith, then of necessity the making of a defense can have no reasonable connection with any imaginary interruption of the selection. Certainly Congress did not think so, or it would not have provided for criminal prosecution in the district courts and would have permitted the Act to remain as the Act of 1917 under which all registrants failing to report were prosecuted by court-martial for desertion. Since Congress did not provide for exclusive jurisdiction to vest with the military authority as to one failing to report for induction, it must be assumed that Congress envisioned that neither the indictment nor the making of the defense could constitute "litigious interruption" of selection and integration of manpower. Trial of the indictment is in no sense an interlocutory order. If the Constitution forbids embodying in any law denial of a defense under an indictment, then of necessity a rule of convenience to an administrative agency cannot overcome the strong provisions of the Constitution securing the fundamental right.

If in other criminal prosecutions the argument of "litigious interruption" and non-interference with the administrative agency be carried to its logical end, there would be no limit to the injury inevitably wrought thereby. The net result would be that a large percentage of innocent men would be convicted of crimes, small and great, without proof of guilt in a court of law.

In the *Falbo* opinion it is argued that there is need to deny the accused his day in court in order to rid the administrative agency of harassing delay of the imagined litigious interruption of the integrating process. This new theory is inconsistent with the court's opinion in *Ohio Bell Tel. Co.* v.

*Public Util. Comm'n of Ohio,* 301 U. S. 292, 304-305. "The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." See also *Patton* v. *United States,* 281 U. S. 276, 290.

The courts below by denying review enacted some *judicial legislation* based on their conception of the necessities of the military machine. The courts thereby disregard the sage advice of Solicitor General Francis Bacon in his essay "Of Judicature", where it is said: "Judges ought to remember that their office is *jus dicere* and not *jus dare;* to interpret law, and not make law, or give law; . . . Judges ought to be more learned than witty, more reverend than plausible [applauded], and more advised [reserved] than confident. Above all things, integrity is their portion and proper virtue."

The present refinement of criminal jurisprudence among enlightened nations has been achieved only after many sacrifices and costly struggles. The fundamental claim of defendants to certain rights in criminal trials was acquired by the people through successive battles for liberty that are chronicled throughout the pages of Anglo-Saxon and American history. Rights thus obtained have become a fundamental part of the unwritten and the written charters of liberty. Some of the leading principles of this great system of criminal jurisprudence are: (1) Presumption of innocence of all elements of the crime; (2) Right to the benefit of any doubt as to guilt; (3) Right to a prior investigation by a grand jury and prosecution by indictment in cases of felonies; (4) Trial by jury of the elements of guilt; (5) Determination of guilt based on facts and not on character or reputation; (6) Immunity of accused one to self-incrimination; (7) Right of accused to offer evidence establishing in-

nocence; (8) Prohibition of double jeopardy; and (9) Protection against *ex post facto* laws.

These great principles of liberty and justice are contrary to the theory of trials conducted in the lands governed by the Roman law, where opposite and oppressive rules have been evolved and applied against the accused. The above common-law principles of justice stem from the maxim that it is better that 99 guilty men go free of punishment than that one innocent man be punished. For decades these principles have been applied for protection of the people. Most of them are guaranteed by specific provisions of the state and federal *compacts,* while others are inherent rights secured in the common law.

After briefly discussing these rights, the court in *United States* v. *Stevenson,* 215 U. S. 190, at page 199, said: "He is entitled to the constitutional protection which requires the Government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty." That the named fundamental rights are guaranteed in the due process clause against denial or curtailment by governmental agencies, as well as the courts, there is no doubt. The court, in *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279, said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. . . . *Twining* v. *New Jersey,* 211 U. S. 78, and the cases therein cited."

In *Rogers* v. *Peck,* 199 U. S. 425, the court said that the defendant must be allowed an adequate opportunity to defend himself in the prosecution.

In this connection see *Windsor* v. *McVeigh,* 93 U. S. 274; *Bradstreet* v. *Neptune Insurance Co.,* 3 *Summ.* 600; *Hagar* v. *Reclamation District,* 111 U. S. 701; *California* v. *Latimer,* 305 U. S. 255; *Fire Department of City of New York* v. *Gilmour,* 149 N. Y. 453; *Stevens* v. *Casey,* 228 Mass. 368, 117 N. E. 588; *People* v. *McCoy,* 125 Ill. 289, 17 N. E. 786; *People* v. *Kaye,* 212 N. Y. 407, 416; *State* v. *Weimer,* 64 Iowa 243; *State* v. *Kirby,* 120 Iowa 26; *Crane* v. *State,* 5 Okla. Cr. 560; and *Richter* v. *State,* 16 Wyo. 437.

When the Arizona civil code took away the remedy of injunction in certain controversies between designated classes of persons the court held the same was in violation of the due process clause. *Truax* v. *Corrigan,* 257 U. S. 312.

In *Edwards* v. *United States,* 312 U. S. 473, the court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

In *Dowdell* v. *United States,* 221 U. S. 325, 330, the statute accomplishing results similar to the criminal sanctions clause of the Act as construed in this case was declared invalid. The court said: "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In the case at bar the reality is that each registrant is actually convicted before the draft boards, with the courts merely imposing punishment upon *ex parte* evidence which does not have the searching light of cross examination, often hearsay, without source of it known, without confrontation of witnesses, without judicial guidance, without findings of

fact to support a conclusion and judged by the unrestrained decision of the 'butcher, baker and candlestick maker' variety of persons who make up the *"judicial body"* of the local boards. This permits a denial of due process and converts the Bill of Rights into a *bill of no rights.* Compare *Diaz* v. *United States,* 223 U. S. 442.

In *Wong Wing* v. *United States,* 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. The court said: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

In order to avoid the consequences of declaring the proceedings and the statute or regulations authorizing same invalid, the Constitution requires that there shall be available an adequate judicial review of the statutory validity of the order or judgment of the administrative agency assuming to act in the premises. In American courts no conviction can be authorized under the Constitution unless evidence is offered which tends to prove the essential elements of the crime charged. In *Tot* v. *United States,* 319 U. S. 463, at page 473, the court declared the Federal Firearms Act invalid, saying: "The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of the statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense."

It has previously been held that before one can be punished for disobeying an administrative order he shall have an opportunity to test its validity in court. In *Panama Ref'g Co.* v. *Ryan,* 293 U. S. 388, it is said: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of

law requires that it shall appear that the order is within the authority of the officer, board or commission." See *Brown* v. *Wyatt Food Stores,* 49 F. Supp. 538, 540.

On this question Mr. Chief Justice Stone, in *Columbia Broadcast'g System, Inc.* v. *United States,* 316 U. S. 407, at page 425, said: "The ultimate test of reviewability is not to be found in an overrefined technique." The lower courts' opinion in adopting the government's argument in these cases has done just that, namely, indulging in "overrefined technique". If the decision is permitted to stand it will place the draft boards in a position to supplant the standing law and substitute the administrative fiat as the supreme law. In *Jones* v. *Securities & Exchange Comm'n,* 298 U. S. 1, 23-24, it was held that an action finding no support in law or an arbitrary finding can be attacked in court by hearing. The court said: "It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest —that this shall be a government of laws—because to the precise extent that the mere will of an official, or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the Government ceases to be one of laws and becomes an autocracy."

The court has repeatedly struck down statutes providing for rates or taxes directly, or the fixing of rates or taxes indirectly through administrative agencies, because such statutes were without provision for a judicial review to protect the constitutional rights of due process and freedom from confiscation. Furthermore, the court has held unconstitutional statutes which subject the person aggrieved to possible penalties and punishments prior to judicial review. A like disposition was made of statutes which either directly or indirectly imposed such deterrent conditions as to render illusory the remedy of judicial review. It would unduly prolong this brief to quote pertinent parts of those opinions.

It has been uniformly held that the writ of habeas corpus is available to effect the release of persons tried and convicted in the United States District Courts in violation of the rights and rules of procedure established by the Constitution. We have heretofore discussed such cases and refer to them here as a part of this argument. See supra pp. 13-28.

It is submitted that upon these grounds alone the petitions for writs of habeas corpus should have been granted in behalf of Lohrberg and Falbo.

## POINT FOUR

**This Court should hold that the trial court in each case committed reversible error in holding that the Attorney General was not a proper party respondent and ordering the Attorney General dismissed, over the objection and exception of appellants below that the Attorney General was a necessary and proper party respondent; therefore the court below erred in affirming the judgment and this court, in exercise of its discretion, should grant the writs.**

The judgment of each trial court against each prisoner commits each to the custody of the Attorney General of the United States. Lohrberg was sentenced to serve a term of three years and Falbo was sentenced to serve a term of five years. The place of confinement in each judgment is to be designated by the Attorney General. The Attorney General is responsible primarily for the custody, control, care and safekeeping of the prisoner. He is authorized to act through his duly appointed agent, servant, employee or representative. He is authorized by statute to maintain and operate the federal prisons in various parts of the United States. The law permits the duty of actually keeping each of these prisons to be delegated to an agent or employee of the Attorney General. It is fundamental that what one does through another is in legal contemplation the same as though done in person.

The Attorney General has placed Lohrberg in the custody of his agent, Nicholson. He has placed Falbo in the custody of his agent, Kennedy. But both prisoners are still in the custody of the Attorney General and at all times subject to his orders and jurisdiction. Neither Kennedy nor Nicholson has the right to absolute custody of the prisoners under his jurisdiction. Each derives his authority solely from the Attorney General.

It seems plain that the Attorney General, being the person primarily responsible for the custody of the prisoner, is a proper party as well as a necessary party to the action. Rule 20 of the Rules of Civil Procedure for the District Courts of the United States does not forbid the joinder. The Attorney General is a person interested in the subject matter of the suit. It is a rule in equity that all persons materially interested are to be made parties so that there may be a complete decree to bind all. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199; *Christian* v. *Atlantic and North Carolina Ry. Co.*, 133 U. S. 233. Although not an indispensable party, the Attorney General is a proper or necessary party to the action. Failure to join him would not stop the action and the joining him is not improper. The joinder of the Attorney General is permissible and it was improper to dismiss him. *Barney* v. *Baltimore*, 6 Wall. 280; *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152; *North Carolina Min. Co.* v. *Westfeldt*, 151 F. 296. Compare *Clough* v. *Strakosch* (CCA-9), 109 F. 2d 330, 332.

The decisions relied upon by the courts below for discharging the Attorney General from the action[38] are contrary to the liberal policy of permissive joinder of parties in the federal courts. The decisions unduly narrow and circumscribe the effectiveness of the writ of habeas corpus, which is designed to cut away all forms and technicalities and get to the heart of a matter. These decisions, although

[38] *Jones* v. *Biddle, Attorney General*, 131 F. 2d 853; *Sanders* v. *Allen*, 100 F. 2d 717.

persuasive when a restricted view is taken, are not binding precedents upon this court and are not controlling when a better perspective of the law of habeas corpus is assumed. The decisions do not conform to the authorities above cited concerning joinder of parties and should be disregarded by this court.

It is necessary to permit the joinder of the Attorney General in order to clinch the jurisdiction over the prisoner pending a disposition of the action. The Attorney General may, pending the disposition of the action, designate some other place of confinement and order the prisoner transferred to another prison in another district before a hearing upon the petition. Before the writ is returned and heard the court could thus easily be deprived of jurisdiction over the prisoner and the purposes of the writ be frustrated. The transfer of the prisoner may be said to require the dismissal of the writ upon a hearing, if upon the return filed by the warden or superintendent it appeared that he no longer had custody of the prisoner, which would make the action moot. *Weber* v. *Squire,* 315 U. S. 810; *Turnello* v. *Hudspeth,* 318 U. S. 792; *Zimmerman* v. *Walker,* 319 U. S. 744; and, *Ex parte Weil,* 317 U. S. 597;[39] whereas, if the court permitted the Attorney General to be named as a party respondent the transfer of the prisoner would not affect the jurisdiction of the court over the Attorney General, who has custody of the prisoner at all times.

It is suggested that the weakness of the argument as to misjoinder of the Attorney General and his not being a proper party is best demonstrated by analogy. Assume that a prisoner is committed to the custody of a sheriff of a particular county under a warrant or judgment and the sheriff turns the prisoner over to the keeper of the jail, who is his deputy. The sheriff and his deputy would

[39] Although we do not concede that a change of custody would make the appeal or action moot, yet until the Supreme Court has clarified the effect of the above decisions it may well be argued that the decisions dictate a conclusion that a transfer would make the case moot.

both be proper parties to an action for habeas corpus. The superindendent and warden here are in the same position as a deputy sheriff, and the Attorney General stands in the same relation as does the sheriff, in the above analogy.

The petitioners respectfully submit that the courts below erred in holding that the Attorney General was not a proper party and in ordering him dismissed from the action.

## Conclusion

Although, because of the lack of express restraint in the Constitution, it may be said by respondents that Congress can deny an inquiry in a criminal case as to the illegality of the order of an administrative agency upon which the indictment is based because of the need to mollify the demands of expediency advanced by some in charge of the war effort, no court can for the same reason deny and suspend the people's right to the writ of habeas corpus. To do such would result in committing innocent persons to prison by fiat of an administrative agency and deprive them of their liberty as summarily as if they were thrown into a dungeon without a judicial hearing. If permitted, it is plain that a condition similar to that which existed under the Court of Star Chamber has been created through the resurrection of alien, ancient and tyrannical theories applied by the cruel and wicked kings of England who drove liberty-loving men to this country to cut and clear out of the wild forests of this continent the beginning of this nation dedicated to the proposition that such intolerable conditions from which they fled shall not be resurrected by intrigue, invasion, rebellion, war, expediency or judicial sophistry. The courts below have done just that. It appears necessary that this court destroy this strange, alien, and freakish product which was engendered, brought forth, and nurtured by the courts below, to the end that the liberty of the people and right to the writ of habeas corpus shall remain secure.

"Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty-loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confession of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

"The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely intrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment

of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless . . .

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."—Justice Black in *Chambers* v. *Florida,* 309 U. S. 227, 236-238, 240-241.

May it please the court to answer this question: Which is more reprehensible, conviction based on confessions obtained by torture, or conviction secured without requiring the prosecution to prove guilt, under Sec. 11 of the Selective Training and Service Act of 1940, where judicial trial is done away with by bill of attainder? Both are condemned in the Constitution. Is not habeas corpus available to rescue the innocent victim from the chains of both? The mere

asking of the question echoes down through the corridors of time the answer YES of the courageous men who wrote the Constitution of the United States.

During the Civil War, in order to make it possible to bring federal troops through the hostile state of Maryland, President Lincoln suspended the writ of habeas corpus in that state. John Merryman, of Baltimore, was arrested by military police for suspected hostility to the government. He was lodged in Fort McHenry under the direction of General Cadwalader. On a petition to Chief Justice Taney, sitting in Masonic Hall in Baltimore, the writ of habeas corpus was granted. An aide-de-camp of General Cadwalader in full military uniform and bearing a sword appeared before the Chief Justice and declined obedience to "that traditional bulwark of individual liberty," which had been issued. The General claimed that he was "duly authorized by the President of the United States to suspend the writ of habeas corpus for the public safety." The Chief Justice issued a writ of attachment for refusal to produce the body of Merryman. The Marshal was not permitted to enter the fort to serve the writ. Taney orally declared that the President could not suspend the writ of habeas corpus nor authorize a military officer to do so. In a written opinion (*Ex parte Merryman,* 17 Fed. Cases, No. 9,487, at pages 144 to 153) he says *inter alia:* "It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers . . . and . . . undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself."

After offering a carefully prepared argument in favor

of the position assumed by the court, the Chief Justice concluded with the opinion that if such a state of affairs was permitted to exist "the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officers in whose military district he may happen to be found".

Shorn of power, but not of courage, the "great Chief Justice"[40] in full expectation that he, too, would be imprisoned, thundered forth the fundamental and eternal principles of civilian freedom from military usurpation. But with a confession of helplessness and despair, he closed an opinion which must rank as one of the most admirable and pathetic documents in American judicial annals: "In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."[41]

It is submitted that under the Selective Training and Service Act the draft boards are made the sole arbiters of whether or not the registrant is under a duty and whether or not the failure to perform the duty constitutes a crime. The District Attorney is authorized to prosecute only when directed to do so by the draft boards when the registrant is reported as a delinquent. Therefore the draft boards undertake to decide, under the Act, what constitutes a crime under the Selective Training and Service Act. The boards decide what constitutes sufficient evidence and when any evidence is required to support the institution of the delinquency proceedings. The draft boards are made the *supreme law* and *supreme courts* of all questions under the Act and the criminal process of the district courts is

[40] See Tribute to Taney by Chief Justice Hughes, *American Bar Ass'n, Journal*, Vol. XVII, pp. 785-790.

[41] The above is verbatim from Jackson, *The Struggle for Judicial Supremacy*, pp. 324-327; Edward McPherson, *The Political History of the United States of America during the Great Rebellion* (Washington 1876), pp. 154-161; and *Ex parte Merryman*, 17 F. Cas. 144.

employed only to enforce *the boards'* arbitrary and supreme fiats.

Under such circumstances to deny a person ensnared in such arbitrary proceedings his right to the writ of habeas corpus is equivalent to a judicial suspension of the writ as a penalty for defying the illegal order.

Under such circumstances, if the writ is not available, the people are no longer living under a government of laws but they hold their life, liberty and property at the will and pleasure of the draft boards in whose jurisdiction they reside. We submit that the eloquent, truthful and forceful arguments of Chief Justice Taney in the *Merryman* case apply here in behalf of the issuance of the writ.

In bringing this extended brief to a close it is not amiss to call to the Court's attention the remarks of Mr. Justice Jackson, of this Court, before The Judicial Section of the New York State Bar Association on January 22, 1944. *Inter alia* he said:

"In the Alaskan Boundary dispute between the United States and Great Britain, an arbitration commission was set up, consisting of an equal number of nationals of each. Of all the forces that might seek to distort judicial judgment I should think the interests of one's country the most respectable. But Lord Alverstone, named to the Commission by Great Britain, joined in an award against his own country. The storm of criticism was not unexpected, nor was it mild. Alverstone is said to have answered simply, 'If when any kind of arbitration is set up they don't want a decision based on the law and the evidence, they must not put a British judge on the Commission.'

" . . . I can think of nothing more important to the prestige of the judicial function in the troubled times ahead than that it hold to the ideal that if they don't want a decision on the law and the evidence, they must not get into an American court."

**This Court ought to exercise its discretionary jurisdiction and grant the writs of certiorari prayed for in the petitions, and the judgments of the courts below should be reversed so as to correct the errors complained of here and committed by the courts below against the petitioners, the prisoners and the Constitution of the United States.**

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York

*Counsel for Petitioners*

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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 884

UNITED STATES OF AMERICA, EX REL. WILLIAM HENRY LOHRBERG, SR., PETITIONER

*v.*

CLAUDE O. NICHOLSON, WARDEN, AND FRANCIS BIDDLE, ATTORNEY GENERAL

---

No. 885

UNITED STATES OF AMERICA, EX REL. RALPH FALBO, SR., PETITIONER

*v.*

M. L. KENNEDY, SUPERINTENDENT, AND FRANCIS BIDDLE, ATTORNEY GENERAL

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

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The petitions in these cases raise the question whether habeas corpus will lie, after conviction on a charge of wilfully failing to report for work of national importance as a conscientious objector, because the convicting court refused to permit inquiry at the criminal trial into the pro-

priety of the defendant's Selective Service classification. The facts in each case may be summarized as follows:

No. 884, the *Lohrberg* case.—William Henry Lohrberg, Sr., filed in the United States District Court for the Eastern District of Virginia a petition for a writ of habeas corpus (R. 1–15) in which he alleged that his son, William Henry Lohrberg, Jr., was confined by respondents pursuant to a judgment of conviction in the United States District Court for the Eastern District of New York for wilfully failing to report to a civilian public service camp, in violation of the Selective Training and Service Act (R. 1–2, 9–11);[1] that at the criminal trial the court improperly excluded from the case the issue of the propriety of petitioner's Selective Service classification (R. 10); and that the court had no jurisdiction in the case because petitioner was in fact a minister of religion exempt from service under the Act, and that the local board's induction order was therefore void (R. 2–3).[2] Further allegations of the petition were directed to showing that the local board and appeal board acted arbitrarily and capriciously in classifying petitioner as a conscientious objector (R. 3–9).

[1] Since the petitions for writs of habeas corpus and for writs of certiorari in both cases refer to both the fathers and the sons as "petitioner," we shall use the same terminology.

[2] It does not appear from the petition for habeas corpus that petitioner appealed from the judgment of conviction.

The district court, apparently without issuing process or holding a hearing, entered an order (R. 18) denying the petition on the ground that, "accepting as true all of the allegations of the petition, I am of opinion that it appears from the petition itself that the petitioner is not entitled to have the writ issue" (see R. 16–18).

The proceedings in No. 885, the *Falbo* case, are a sequel to *Falbo* v. *United States,* 320 U. S. 549, where this Court held that a defendant in a criminal prosecution for failure to report for induction or for work of national importance is not entitled to challenge, as a defense to the indictment, the propriety of his Selective Service classification. Following the affirmance of his conviction, Falbo's father filed the present petition for a writ of habeas corpus in the United States District Court for the Southern District of West Virginia. The petition consists of a recital of the facts which were before this Court in the prior case, showing Falbo's registration under the Selective Training and Service Act, his classification as a conscientious objector, his failure to report for work of national importance, and his subsequent indictment and conviction. (R. 1–14.) In substance, as in the *Lohrberg* case, No. 884, petitioner's allegations are calculated to show that he is a minister of religion; that although his draft board failed so to classify him, it had no power to order him to report for work of national importance as a conscientious objector;

that his failure to report, therefore, was not a violation of the Act; and that the failure of the convicting court to permit him to make this defense rendered its judgment void.

In response to the petition respondent Kennedy interposed a "demurrer" (R. 15–16) alleging that petitioner was legally held in custody pursuant to a lawful judgment of the convicting court, which was affirmed by this Court; that the matters asserted by petitioner were matters for adjudication in the criminal proceeding and that they were there adjudicated; and that the petition failed to state any ground calling for the issuance of a writ of habeas corpus.

After hearing on the petition and demurrer the district court entered an order sustaining the demurrer and dismissing the petition (R. 18–19).[3]

On appeal the cases were argued together and the Circuit Court of Appeals for the Fourth Circuit in a single *per curiam* opinion affirmed the judgments of the district courts (No. 884, R. 19–21).

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[3] Respondent Biddle appeared specially in this case and in the *Lohrberg* case and moved for dismissal of the petitions as to him on the ground that he was not a proper party and was not within the jurisdiction of the court; the motion was granted in each case (No. 884, R. 16, 18; No. 885, R. 15, 18). The correctness of the courts' action in this respect is not open to serious question. *Jones* v. *Biddle*, 131 F. (2d) 853 (C. C. A. 8), certiorari denied, 318 U. S. 784; *Sanders* v. *Allen*, 100 F. (2d) 717 (App. D. C.).

Permeating the petitions for writs of habeas corpus and certiorari is petitioners' contention that the Selective Service boards acted arbitrarily and capriciously in classifying them; that the boards' orders to report for work of national importance were therefore void and thus furnished no basis for the prosecutions; and that, in substance, they were deprived of an opportunity to defend themselves by the refusal of the convicting courts to permit them to adduce proof seeking to show the impropriety of their classifications.

These very same contentions were before this Court on review of the judgment of conviction in the *Falbo* case, 320 U. S. 549, and were there unequivocally rejected. In the subsequent decision in *Billings* v. *Truesdell,* No. 215, this Term, decided March 27, 1944, the Court reiterated the doctrine of the *Falbo* case that unless a registrant follows the administrative procedure by reporting pursuant to the order of his local board, "he may not challenge the legality of his classification in the courts" (slip opinion, p. 13). See also *Yakus* v. *United States,* Nos. 374–375 this Term, decided March 27, 1944 (slip opinion, pp. 22–23); *Ex parte Catanzaro,* 138 F. (2d) 100 (C. C. A. 3), certiorari denied, March 27, 1944, No. 709. Petitioners urge, however, that when they passed their physical examinations "the process of selection was complete because petitioners had been accepted for service" (Br. 2–3).

But the Court held in the *Falbo* case that the registrant classified as a conscientious objector and found upon physical examination to be qualified for service is under the same obligation to obey the order to report as is the registrant classified for military service, and that in neither case is the administrative process complete until the registrant is finally accepted for service by the armed forces or a civilian public service camp (320 U. S., at 553).[4] It is therefore plain that petitioners were lawfully convicted; hence there is no basis for habeas corpus.

For the reasons stated, we respectfully submit that the petitions for writs of certiorari should be denied.

CHARLES FAHY,
*Solicitor General.*
TOM C. CLARK,
*Assistant Attorney General.*
ROBERT S. ERDAHL,
*Special Assistant to the Attorney General.*
IRVING S. SHAPIRO,
*Attorney.*

MAY 1944.

[4] As shown in our brief in the *Falbo* case (No. 73, pp. 44, 56), a registrant classified IV–E as a conscientious objector receives his final type physical examination before he is ordered to report for work of national importance at a civilian public service camp. In the *Billings* case this Court adverted to the fact that substantially the same procedure has since been adopted in respect of registrants classified for military service (slip opinion, pp. 9–10).

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